A GUIDE TO ENGLISH JURIES:

Setting forth their *Antiquity*, *Power*, and *Duty*, From the *Common-Law*, and *Statutes*.

With a TABLE.

By a Person of Quality.

ALSO

A LETTER to the Author, upon the same SUBJECT.

London, Printed for *Thomas Cockerill*, at the *Three Leggs* over against the *Stocks-Market*. 1682.

A
GUIDE
TO
ENGLISH JURIS

To all Honeſt

JURY-MEN.

Gentlemen,

IN *a Word*, You *are* England's Ephori, *and* Tribuni; *The Boundaries of* Prerogative *and* Priviledge, *and the living Bulwark of the* Laws. *Your* Honour *is Eclipſed, is unaccountably* * *Shrunk: The* Office *yet is Great: Here's Demonſtrated the Great Priviledge you be, that it may be ſeen how much all* Engliſh-men *ought, in Intereſt, to Value and Encourage you. Here's ſet forth* What *and* How *you may Do, and* What *and* How *you may not Do, under what Penalties: Alſo*

* Learned Dr. *Cowel*, in word *Jury*, ſpeaks of *Juries* being (in his own words) *Aſſociates and Aſſiſtants to the Judges of the Court* (anciently) *in a kind of Equality; whereas, now adays*, (ſays he) *they attend them in great Humility*, &c. Citing alſo *Lamb.* and *Cuſt. of Normandy* agreeing with him.

the History of the Whole. The King is graciously pleased to Declare, He will Govern by Law; *It's fit you should know how to Govern your selves according to Law. This is Concise, and a Breviat, rather than a Book, that, should it meet with a queasie Stomach, little Purse, or narrow Soul, the same might not stumble at it. If any thing by this means happen so general, as admit of any Exception, you may expect it in some other, if not in the same place. It's chiefly about Criminal Causes, where the King's Name's used for that of the Plaintiff, because, most Difficult and of Greatest Concern; But is serviceable and sufficient for others too. It may, at least, serve to Stir up, and to Foil, if not Assist learneder Hands.* Adieu.

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A Guide

A GUIDE TO Engliſh Juries, &c.

OF what Date Juries be, is the ſame to ſay, as when was *England* firſt Inhabited, altogether uncertain. But that their Antiquity herein *England* runs to and beyond the *Norman* Conqueſt, among the *Danes*, the *Saxons*, and the *Britains* is moſt certain. *Olaus Magnus*, *Olaus Wormius*, *Verſtegan*, *Forteſc. Co. Lit.* &c.

The *Saxons* Conquering the *Britains*, mixed their Cuſtoms with

the *Brittiſh*, ſo the *Danes* thoſe *Brittiſh* and *Saxon* ones with theirs, and the *Normans* all theſe with theirs; every Conquerour making ſome alteration. Yet this Law was, and from time to time hath been preſerved and continued an Inheritance indiſputable and Sacred unto us through all Revolutions, without any Interruption.

None but muſt acknowledge this of all others the beſt and moſt effectual way to find out Truth. There is no other way or Art in the whole World, ſays *Forteſcue*, ſo remote from all danger of Subornation and Corruption, 75.

Aaron had, it's true, in plain Letters of Gold, *Urim* and *Thummim* wrote on his Breaſt, ſignifying what he either had, or ought have had, *lucem in monte, ac in voluntate rectitudinem*, Ability in Parts, and Integrity in Practice.

But

But have always all other Judges ſince had ſuch Parts and Practiſes? Their Intereſts, Ambition, Pleaſures, other Paſſions and Frailties influenced them too much, rather ſufficient enough to render them, as the Prophet *Iſaiah, c.* 33. *v.* 15. ſays, *Idols with Eyes, Ears, and Mouths,* viz. *Such as would neither hear the Peoples Complaints, regard the Oppreſſed, nor pronounce a juſt Judgment.* Judges have Places and Preferments ſo extraordinary Honourable and Profitable. And what's their Tenure? Even during pleaſure, a term for ſo long as they do nothing but what and as pleaſes, *&c.* and do every thing which and as does pleaſe, *&c.* And whoſe pleaſure muſt it be? Truly every ones too, that any how has or can make any intereſt, *&c.* Thus a ſhort Syllogiſm proclaims them little other than Bond-ſlaves to ſuch mens plea-

ſures, and menaces the People with the worſt of all Miſeries, Law-oppreſſion, Oppreſſion under colour of Law; unleſs it be conceivable Mens pleaſures were to have the Judges give Sentence againſt them. Judges alſo were all Lawyers we know, uſed juſt before to take Fees, it's the more therefore all forget it now. Judges are concerned in ſo many Cauſes, they are ſubject to be tempted the oftner, and every temptation is the greater, becauſe they know, if would yield, their gain might be ſo often. Judges are ſo few, it's plain they may the eaſier be Corrupted. Judges can't want Courage, they think themſelves lyable to no Action, &c. in any caſe, do what they will, but are abſolutely diſpuniſhable, *Co.* 12. 24, 25. *Hutton.* Whereas a Jury, on the other ſide, if it err, in many caſes it's lyable to an Attaint, the

the greateſt Puniſhment they know on this ſide Death. A Jury conſiſts of many Perſons. Thoſe which be Jury-men in one Caſe, yet may be in few more. They be Men of other Profeſſions, uſed never in any Caſe to take Fees, *&c.* They are not prejudiced with fear of loſing their Offices, *&c.*

And to further manifeſt the difference of Tryal by Judges, and of this by Juries, Jury-men all are, and muſt be *Liberi & legales homines.* *Liberi* free of, and from all manner of Bondage, Obligations, Affections, Relations, Paſſions, Intereſts, and other Prejudices whatſoever (as indeed it's ill Fiſhing in muddy or troubled Waters.) *Legales,* ones Peers or Equals. *Mag. Ch. c.* 29. *Weſt.* 1. *c.* 6. Of full 21 years old, not Out-lawed, never Attainted or Convicted of Treaſon, Felony, Falſe-Verdict, Perjury, any

Conſpiracy at Kings-Suit, nor ever Adjudged to the Pillory, Tumbrel, *&c.* whereby rendred Infamous; nor any Alien (unleſs an Alien be Tryed, *&c.*) But ſuch others as be moſt nigh, moſt ſufficient, and leaſt ſuſpicious, 28 *E.* 1. *c.* 9. *F. N. B.* 165. *Dy.* 59. 34 *E.* 3. *c.* 4. *Regiſt.* 177. 8 *E.* 3. 30. They were Anciently all Knights, *Glanvil. l* 2. *c.* 14, 15. *Bract.* 116. They are, and muſt be yet Perſons of Honour and Repute. 1 *R.* 3. *c.* 4. *Brit.* 39. *Mir.* 117, 118. 11 *H.* 7. 41. *Young* 116. 11 *H.* 4. 35. *Stanf.* 88. And *Si l' Enditement ne y ert een fait de croyable gents & de bone fame, n'eſt nul tenus à cette reſpondrue.* If an Indictment be found, but not by Credible People, and thoſe of good Repute, no body's bound to take notice of it, *Mir.* 200. They muſt be ſuch Perſons as are named and returned at Election of the Sheriff or Coroner.

They

They muſt be every one Sworn every ſeveral Tryal, and that in and by a particular Oath. If any of the Grand Jury be as aforeſaid, anywiſe amiſs, what they do is quaſhed and made void on bare motion to the Court. If any of the Petty-Jury happen ſo, the party by Challenging of them, as appear to be Sworn, either ſets aſide the *Pannel, viz.* all of them, or may any of them, by taking exception to the Poll, *viz.* to them ſeverally, as the Caſe falls out; and peremptorily, without ſhewing any Cauſe, may Challenge and ſet aſide as many as will, under 36. in caſe of High Treaſon or Miſpriſion of High-Treaſon; or under 21. in caſe of any Felony. And ſhewing any ſuch Cauſe as aforeſaid, as many as will, in any Caſe whatſoever, *Co. L.* 156. Now they are ſuch Elect and choice Men, becauſe of the great Truſt repoſed

in them: And muſt be Equals, that the Defendant may the better ſpeak to, and expoſtulate with, or reflect upon them, if do amiſs And that they may not be over-awed, &c. by's being greater than them; (whereas *Magna ſtupent, ſuperiora perſtringunt.* Greater things confound and aſtoniſh us, and things above us dazel our Eyes.) Nor be careleſs or perfunctory for his being much leſs than them, (*Inferiora ut exigua & minima contemnimus.* We are apt to ſlight things beneath us, as ſmall and contemptible, or inconſiderable.) And muſt be of the Neighbourhood, that coming from nigh where the Queſtion ariſes, the Defendant, in all probability, may have the better knowledg of them to except againſt, or to approve of them; and ſuch may alſo the more likely know ſomewhat themſelves of the Party, of the Matter, of the Credit

Credit of the Witneſſes, and all Circumſtances. *Lex intendit vicinus vicini facta ſciat. Co. L.* 78. Thus if the place happen diſputable, whence the Jury ſhall come, they ſhall come from whence the matter is like beſt to be known. 21 *E.* 4. 8. Beſides, in this way of or by Jury, where Life or Member is concerned, or in any danger, and in all other Criminal Cauſes is required two Tryals of the Party before he can be ſaid Guilty, or any Judgment can be given againſt him: And the Party muſt alſo be found to be Guilty on both theſe Tryals, elſe all is nothing. The Grand Jury muſt firſt Examine the matter, and the Petty-Jury after Examine all again to prevent and ſecure againſt all ſurprizes of the Party, and Miſtakes or Errors in the Jury. It ſeems as if very Anciently the number on a Jury was indefinite, but it was all the Perſons preſent,

come as would come, *Britt. N. Bacon, &c.* Like as of Old it was here of thoſe we now call the Houſe of Commons: *Concil. Brit.* 350. *Ingulph.* &c. And in the Tryals at *Rome*, where *Vox Populi* was the Verdict, (except in Caſe of a Senator, which indeed was Tryed by his Peers, other Senators.) Hence probably it was that all Courts were at firſt to be open, and ſo acceſſible. Likewiſe *Deut.* 19. and ſome other Texts of the Old Teſtament, ſeems as if the Tryal amongſt the *Jews* were ſo. But in Analogy of late it's reduced to the number of twelve, like as the Prophets were twelve, to foretell the Truth; the Apoſtles twelve, to Preach the Truth; the Diſcoverers twelve, ſent into *Canaan* to ſeek and report the Truth; and the Stones twelve, that the Heavenly *Hieruſalem* is Built on: And as the Judges were twelve anciently to Try and Determine matters of Law,

and

and always when there is any waging Law, there must be twelve to Swear in it; and also as for matters of State, there were formerly 12 Councellors of State. And any thing now which any Jury can be said to do, must have the joynt consent of twelve, *West.* 2. *c.* 13. Else it's in construction of Law, not the doing of the Jury, but of Private Persons, and void. *Mir.* 42. 200. 41. *Ass.* 11. 6 *H.* 4. 2. 21 *E.* 3. 31. 29 *E.* 3. 43. *Finch.* 58. The Grand Jury consists of more Persons commonly than twelve, but as aforesaid twelve agreeing, it's enough, and so many of them must. So that by the Law of Juries 24 Men in all, first and last, find one Guilty, *&c.* before the Judgment can be given, or one can be punished for the Fault one's accused of. And besides every Man of the later Jury, even all the whole twelve must all and every of them

them agree, and be of that one and only Mind; (much to ſuſpect, unleſs one be certainly and plainly Guilty. It's more for all twelve, than for twenty nine out of thirty to agree.) Any of the Grand Jury giving in a Preſentment or Indictment without eleven more of the ſame Mind, and agreeing with him, ought to be Impriſoned, 40 *Aſſ.* 10. which alſo for any one of the Petty-Jury to do, none will deny but to be worſe. A Judge was Hanged for giving Judgment on the Verdict of eleven Jury-men. *Mir.* 296. But on the other ſide, the Judges are not ſo many at a Tryal ſcarce ever, the major part of them agreeing, it's enough; their Tryal would be but one, or once only; they are never Sworn at the Tryal, nor ever at all, but only once, and that exceeding generally; they cannot any of them be excepted againſt,

againſt, or Challenged (though Anciently might. *Lamb. Mir. Bract. Fleta*) be they never ſo great ſtrangers, profeſſed Enemies, and otherwiſe ill qualified; And though the King be party, yet chooſes them himſelf againſt one.

Beſides, if Judges had Power of both determining the matter of Fact, and alſo the matter of Law, as muſt, if were no Juries, their Latitude of Erring, *&c.* muſt then be the greatter, and their doing wrong or miſchief might be the more, in as much as might wrong one then in both the Fact and Law; and their Encouragement ſo to do, would be Improved, ſince then it muſt be harder to detect them, as whether erred in the Fact, or in the Law, or partly in both; like as it's eaſier ſeeking a Buſh than a Wood. And as it's ſaid, *Occaſio facit furem.* Opportunity makes many a Whore.

But

But were Judges preſumed Saints, and never ſo upright, &c. yet who can imagine but at a Tryal, when Witneſſes are all Examined, and Evidence all given, the Jury being ſo many Perſons, and probably knowing ſomething of the matter before, they may all aſſiſting one another better obſerve, remember, and judge upon the whole matter, than any one or two, &c. others, though called Judges? Certainly one may do more with help than without. So the Proverb is, *Ne Hercules quidem contra duos; oculi plus oculo vident.* Two to one is odds at Foot-Ball: And *Non omnes ſed pauci decipi aut decipere poſſunt.* The fewer may the more eaſily deceive, or be deceived. *Quandoque bonus dormitat Homerus. Nemo ſine crimine vivit. Humanum eſt errare.* It's natural for Man to err. None's without fault, and the ſureſt foot may ſlip.

Viſc.

Viſc. St. *Albans*, *Aph.* 8. ſays That's the beſt Law which leaves the leaſt to the Arbitrarineſs of a Judge; and *Bract.* 119. ſays, Judges repreſent the Kings Perſon, they are his Officers, and Act in his ſtead, (and hence concludes) they ought not at all be concerned in Cauſes of Life or Member, *&c.* (where the King's Party) for, ſays he, the King is thus Judge as it were in his own Cauſe.

Thus appears what is the difference of Judges and Juries, and ſomething of the Reaſon why the Parliament has all along been ſo Zealous for Tryals by Juries, as no fewer than 58 ſeveral times ſince the *Norman* Conqueſt, hath eſtabliſhed and confirmed the Tryal by Juries; no one Priviledge elſe nigh ſo often remembred in Parliament.

Now, for the Power and Authority

rity of *Juries*, and how the Wiſdom of the Law hath entruſted and enabled them in this Tryal. The Law ſays, in Tryals, whether any Complaint as made, or any matter as alledged be true or not, the Judges ought not, nor can ſay, nor have any thing at all to do therewith, but the Jury only. *Ad queſtionem facti non reſpondent Judices.* All the whole, or moſt they can do, or at leaſt ought, is only after and upon what the Jury, or the Parties themſelves agree firſt to be true. What the Jury does, is called *Verdictum*, *Veridictum*, the declaring of what is the Truth in the matter. What the Judges do, is called *Judicium*, *Juris dictum*, the telling only of what is the Law. Thus it is that every finding of the Jury as their Verdict, &c. muſt be poſitive what the Fact and Party's intent &c. was, and not ſaying only what their Evi-

dence

dence is, that it was; for the Judges can't even ſo far meddle with, or take Conuſance of the matter of Fact, as but to ſay, then the Fact, Caſe, &c. is ſo and ſo, if you agree your Evidence to be ſo and ſo, and accordingly give Judgment. *Co.* 9. *Downham's c. Co.* 10. *Oxford c. Benlow* 3 *E.* 6. *Iſaac & Clerks c. Hob.* 167. As *A.* delivers *B.* Goods, and after demands them again of *B.* but he refuſes to deliver them again; If *A.* ſues *B.* for finding theſe Goods, and converting them to his own Uſe; the Judges will tell the Jury, ſince *B.* refuſes to re-deliver them, this is Evidence enough to find him Guilty of converting them to his own Uſe, &c. and is in Law a Converſion. But if the Jury give their Verdict, &c. ſpecially as that *A.* delivered *B.* the Goods, and after redemanded them, but *B.* refuſed the delivering of them back (without

(without saying positively *B.* converted them to his own Use, or not saying generally, we find for the Plaintiff, which is *tantamount*, the Judges can't say and Judge *B.* Guilty, *&c.* but must discharge him. So where in a Tryal, fraud is pretended by one Party done, *&c.* by the other, the Judges will tell the Jury, such and such parts of the Evidence prove the fraud, or in construction of Law are fraud. But if the Jury give their Verdict specially, that such and such things are true (which the Judges said prove the fraud) and not saying positively there was fraud, the Judges can't say or Judge fraud, nor take the least notice of any thing as such. In the Case of *Roger Mortimer* in Parliament, *An.* 1 *E.* 3. it was adjudged there, 28 *E.* 3. *n.* 10. that the matters he was accused of, though were notorious and known to them all in Parliament

ment, and all People elſe, yet they could not give Judgment upon this, nor any time ought proceed on any knowledge of their own. One Condemned of Treſpaſs in the Common-Pleas, the Judges ſeeing him in Court, and knowing him never ſo well, yet it was adjudged, if he deny himſelf to be the ſame Perſon, they can't ſay he is, and ſo cauſe him apprehended; becauſe they can't Judge of any thing, nor take notice but only of what is upon Record before them, *33 H.* 6.55. Thus if *A.* be Indicted of ſtealing five ſhillings, the Jury may give a Verdict, that he is Guilty of ſtealing the five ſhillings, but only to the value of ten pence; and the

In *Henry* the Third's time 1 *s.* was as much as 40 now, and before then, more; yet the Law was then, one muſt ſteal above the value of 1 *s.* to be Guilty of Felony, So that Merciful Juries now value by the Ancient ſhilling, and ſave many, not Guilty of above the value of 40 *s.* preſent Money.

Judges

Judges here can't ſay the five ſhillings were more worth or leſs, though never ſo apparent. King *Henry* the fourth asking Judge *Gaſcoyn*, what if he ſaw *A.* kill *B.* and the Jury will find not that *A.* killed *B.* but that *C.* did? He anſwered, I can only Reprieve *C.* and then intercede with your Majeſty for his Pardon. *Pl.* 83. The Infamous *Empſon* and *Dudley*, proceeding to Judge as Judges, of matters upon Information by Witneſſes, *&c.* otherwiſe than by Juries; this was one indeleble blot in their Eſcutcheon, though had an Act of Parliament (1 *H.* 7. *c.* 3.) to warrant them in ſo doing. *Ander. l.* 1. 156. When a Priſoner is Arraigned, he ſays, he puts himſelf on God and his Country (neither of which are the Judges) for his Tryal; which Country is the Jury. So it is manifeſt, Juries have the ſole Power and Conuſance of the matters

ters of Fact, as whether a thing be true or not, &c. and the Judges have at moſt only to do with matters of Law.

Jury-men have alſo the determination of Law, but with this difference from that of Fact, that it's neceſſary they determine the matter of Fact. But they may either refuſe to meddle with any thing of Law, and leave it to the Judges, or at their Election may take upon them knowledge of the Law, and determine both Fact and Law themſelves. *Lit.* §. 368. and ſo is every daies Experience, whereof ſee more anon, ſpeaking of general Verdicts, and ſpecial Verdicts. Only if a Jury give a Verdict, ſetting forth ſpecially or particularly how the matter was, and then draw an ill Concluſion as to the matter of Law thereupon, the Judges will Judge againſt, and ſo make the

Judg-

Judgment of the Jury in the matter of Law void. *Hob.* 53. As ſuppoſe *A.* be Indicted of Murdering *B.* the 10*th.* of *Feb.* &c. And the Jury give their Verdict, that *A.* gave the Wound at *C.* the 5*th.* of *Feb.* and that *B.* died at *D.* the 10*th.* of *Feb.* And conclude that *A.* Murdered *B.* at *C.* or on the 5*th.* of *Feb.* Now the Law ſaying the Murder was or and at the place and time when and where the Party died, the Judge will Judge againſt the Judgment of the Jury. *Co.* 4. 42. So *Anno* 1654 in *B. R.* between the Protector and *Somner*, the Court ſaid, the Jury had concluded contrary to their premiſſes, finding he killed two Men on the Road, but calling it Man-ſlaughter, *ſe defendendo:* And the Judges Ordered him to be Tryed again.

Thus we ſee, Judges are uneſſential and needleſs in a Tryal by Jury further

further than to aſſiſt it by anſwering and informing what the Law is where difficulties ariſe, or at leaſt the Primitive conſtitution might be thus. Like as alſo yet they be in the Houſe of Lords, or when any Tryal is by the Lords but Aſſiſtants only, when conſulted; and no Parties of or at the Tryal, *&c.* Or as it is, and always has been in Courts Barons, Hundred Courts, Courts of Ancient Demeſne and County Courts. *6 E.* 4, 3. *Crompt.* 232,233. andwhere the Sheriff is made Judge, though by the Kings Writ, *&c. Co.* 6. 11, 12. The very form of ſpecial Verdicts to this day, looks as if it were ſo. As in Murder, the Jury find and give their Verdict (firſt) how, and in what manner particularly the Fact was committed, and then ſay, But whether upon the whole matter aforeſaid, the killing aforeſaid of *J. S.* be Murder (in con-

conſtruction of Law) the Jury is ignorant, and therefore ask the Advice of the Court; and (further ſaying) if upon the whole matter aforeſaid it ſeem to the Judges and Court, that it is Murder, then *the Jury* on their Oath, *ſay, the ſaid J. N. is Guilty* in manner and form as by the Indictment againſt him is ſuppoſed. And if upon the whole matter, &c. it ſeem, &c. that it is not Murder, then, &c. *J. N.* is not Guilty in manner, &c. *Co.* 9. 64. So all the Judges do, is but Advice, though in matter of Law; and it's the Jury only that Judges one Guilty or not Guilty of Murder, &c. and whether it be Murder, or what one is Guilty of, by the Advice and Aſſiſtance only of the Judges, without their being any wiſe any Parties of or in giving ſuch Judgment. And the Reaſon, and only Reaſon why it ever ſeems otherwiſe, may riſe hence,

hence, that the Judges of *Weſtminſter-Hall* keep the ſaid inferiour Courts to their due Bounds, Methods, and Order. And the Lords keep the Judges to theirs, when amongſt them; but there's no body does in *Weſtminſter-Hall.* The like is hinted by the *Stat.* of *Marlb. c.* 26. which ſays, *Murdrum*, &c. *non adjudicetur coram Juſticiariis.* Murder, *&c.* ſhall not be adjudged in the preſence of the Judges: Shewing the Judgment always to be in the preſence of, and not by the Judges. The Ancient Books call Jury-men Judges, as *Mir.* 209. And it's not for nothing, the Law is ſo tender of them. He that ſtrikes one of them, it's perpetual Impriſonment, and forfeiture of the offending Hand. *Judg.* 174.

It, perhaps, may be pardonable in Councellors, becauſe for their

Fees, and not pretending Authority: But why Judges, though apt to Indulge, Improve, and Extend their own Power and Juriſdiction, ſhould offer to brow-beat, threaten, order, impoſe upon, or wheadle, flatter, tempt, inſinuate with, or any wiſe lead, perſwade, direct, incline or diſpoſe Juries how to find their Verdict, unleſs only directing them ſo far as Juries require of them? it's hard to ſay. People daily Rob, and ſo have done on *Salisbury-Plain*, but it's ne'r the more Lawfull. Thus are Judges Trumpets, and Juries the Echo, let who will blow. Thus are Juries but an empty name: Thus is turned topſy-turvy all the whole thing of Juries. Thus might the Judges draw, and ingroſs to themſelves the whole Power in the Tryal, and be in effect Judges and Juries too. Thus is the Tryal by

Juries

Juries a colour, a ſham, and really no Tryal at all by Jury. Were this allowable by Law, we ſhould never have had any; the having them would thus be only an unneceſſary trouble, *&c*, whereas *Lex nunquam per plura quod poſſit per pauciora.* The Law never ſets up or requires any thing ſo vain or fruitleſs.

But ſome will ſay, the Jury can do nothing but on the Evidence given in Court, which the Judges hear as well as the Jury, and ſo may ſee the Truth, and know how the Verdict ought to be as well as the Jury, and conſequently they may Inſtruct, Aſſiſt, *&c.* the Jury. It's true, they may be helpful, they may aſſiſt, but however, it's no matter for their being as aforeſaid, too Officious. And beſides, as aforeſaid, that the Jury is Neighbours of the Fact, of the Party,

of the Witneſſes, *&c.* but the Judges ſtrangers; and the Jury be more Perſons, and the Judges fewer, *&c.* The Jury alſo is not bound up to the Evidence only given in Court, or that the Judges hear, but may go upon their own private knowledge Suppoſe *A.* ſues *B.* on a Bond for ten pounds, and *B.* pleads payment; but at Tryal proves nothing: The Judges themſelves ſay to the Jury, you muſt find for *A.* unleſs know the Money paid your ſelves: Which ſhews the Jury may find for *B.* if they know the Money paid, though the Judges knew nothing of it, 4 *H.* 7. 29. So *Hob.* So if one be Arraigned, and no Witneſs produced againſt him, the Court ſays the like; as was ſeen this *Michaelmas* Term, 81. in *B.R. Bradley's* Caſe, and by daily practice. They uſe their own knowledge beſides, and often againſt the Evidence

Evidence in Court, *Cr. El.* 616. *Groves* and *Shorts* Caſe. So in *Plowd.* 410, 411. So a great Caſe adjudged in *B. R. Hill.* 21 C. 1. And another there, 22 C. 1. And ſo ſays *Stanf.* If a Jury know any thing of themſelves, it's as much as by Evidence, 130. So *Plowden* ſays, a Petty Jury is ſometimes bound to give their Verdict, though have no Evidence, *f.* 12. Hence in all Caſes at Common Law, one Witneſs is accepted of as ſufficient; and doubtleſs any Verdict is good, though in ſuch Caſes, without any Evidence given in Court, becauſe the Jury is preſumed to know ſomewhat of themſelves. Whereas in all other Countries in the World, where Juries be not uſed, and here when the Tryal is without a Jury, there muſt be at leaſt two, as hereafter ſhall be ſaid more at large. Thus in any Attaint

brought againſt a Jury, more Evidence may be given on that ſide the Jury paſſed of or for, or in behalf of the Jury, than was given before, *Dy.* 53.[b] which could not be, if their own knowledge were not Evidence as well as that given in Court. *Styles* ſays, 23 *C.* 1. in *B. R.* it was adjudged, that the Grand Jury are not bound to find an Indictment, though have Evidence, ſince they may know ſomething of themſelves to over-balance it. So is *Plowden*, A Jury may ſometimes go againſt their Evidence given in Court, 8.[b] And one may read, Juries were Anciently puniſhed for going though according to the Witneſſes, if happened falſe ones, *Mir.* 48. The Evidence to a Grand Jury is ſeldom heard by the Judges, which yet could not be, if none were Evidence but what given in Court.

Like-

Likewiſe a Jury knowing of a Record, Statute, &c. may give their Verdict, &c. according to *it*, though never given in Evidence. *Moor* ſays, a Jury-man delivered his Companions a certain Paper concerning the Queſtion out of Court, yet the Verdict was adjudged good, *Caſe* 656. Beſides, if it happen they have no other Evidence but what the Judges know as well as they, yet they ought by, and according to the true purport and meaning of their Oaths, to proceed on it in their own ſenſe, and as they apprehend or underſtand it themſelves, and no otherwiſe, though the Judges differ with them; elſe how can they diſcharge their Conſcience? And it often falls out, they may differ. No two Lawyers, nay, Judges reading or hearing the very ſame Caſe, but preſently make different Inferences,

Deductions, Collections, Concluſions, and Arguments, yea, the ſame Perſon at different times; like as the Philoſophers hold our Senſes and Sentiments as different as Phyſiognomies. And why ſhould *A.* impoſe his Opinion on *B* rather than *B.* on *A?* So of Judges and Juries. One can't ſee by another's Eyes. And this is certain, every thing any Jury does, as a Jury, is on Oath, and they ſwear to be true by virtue of the Oath at firſt adminiſtred them; therefore if any of them happen to joyn in a Verdict, &c. with the reſt againſt *his* Opinion, or not throughly ſatisfied in their *own* private judgment, ſuch a Verdict, &c. though never ſo true and good in it ſelf, yet makes the Party or Parties, as aforeſaid, not ſatisfied, certainly forſworn, at leaſt *in foro Conſcientiæ*, as to their Conſcience. For Perjury is not only

only a lye confirmed by Oath, but likewiſe either when any one being deceived, and believing that to be true which is not, raſhly, or unadviſedly ſwears it to be true. Or either when any one thinking a thing not true, ſwears it is true, though indeed it be true, *Flet.* 334. *Bract.* 288, 289, 292. and all the Caſuiſts. So is ſeen in *Palmer's* Reports. One was Indicted and Puniſhed for ſwearing a thing ſo and ſo, becauſe he did not know it to be true as he ſwore, though the thing was really and truly as he ſwore. So that upon the whole, one may ſee a Judge ought not to meddle at all with the Jury: If he differ not with them, it's needleſs and troubleſome; if he differ, they are not to mind him; take it which way one will.

But perhaps it will be urged, that this muſt be underſtood only as to trying matter of Fact, and that however, as to matter of Law, the Jury ought always to be adviſed and governed by the Judges, though not as to matter of Fact. No, no further than a mannerly deference that is payable to the Judges, as more Learned in the Laws. For if the Judges ſay, or any Witneſs ſwear the Law to be ſo and ſo, no Jury is by Law bound, or any wiſe obliged beyond their own Reaſon, &c. at leaſt to beleive them in it, 9 *H.* 6. 38. *Finch* 58. If an Attaint be brought againſt a Jury, it's no Excuſe, that the Verdict is according to the Judges Directions, *Cro. El.* 309. 18.

Now, ſays a timorous ignorant Juror, Oh! but whether the Law be thus or not, the Judges will Puniſh

Puniſh the Jury if comply not with them. This ſure would be pretty! A Jury, perhaps, forſworn, and lyable to an Attaint, if do comply, and yet puniſhable if do not: No, no, the Law (which is nothing but improved and refined Reaſon) was never ſo unreaſonable to ſuffer this. *A.* levyed a Fine of Lands to *B.* and *B.* paid *A.* the purchaſe-money. But after *A.* ſaid, he was then at levying the Fine under Age of One and Twenty years old, and therefore the Fine was void. The Law ſays here, the Judges ſhall determine by looking on the Party, whether he were of full Age or not, and the Jury ſhall not (the true Reaſon being, that if the Party ſeem of full Age, though he be not, he ſhall not avoid the Fine, to prevent cheating, &c. Whereas if the Jury were to try it, they muſt not go according to the ſeem-

ſeeming but real true Age, and ſo if he want but a day of One and Twenty years, he muſt thus be adjudged under Age as much as if he wanted Twenty years, and *B.* ſhould be cheated.) This Fine was after reverſed by Kings Bench, becauſe *A.* did appear, and was alſo proved by Four Witneſſes to be under Age. But the Validity of the Fine coming after to be diſputed in Common-Pleas on a Tryal by Jury, though the Court here told the Jury, that notwithſtanding ſome Witneſſes prove to you *A.* was of full Age at levying the Fine, yet you ought not to heed them, for the Judges have the ſole and only power of determining whether of full Age or not, and the Judges of the Kings Bench have already determined it; nevertheleſs the Jury being ſomewhat extraordinary, and not ſo very leadable Men, gave their Verdict con-

contrary to the Direction of the Court, and as if *A.* were then of full Age. And an Attaint being after brought againſt the *Jury*, the *Jury* was acquitted and commended, *Dy.* 201. & 301. And the *Jury* is the more juſtifiable in it, ſince the Judges firſt altered the Law, in trying by Witneſſes, and not only by Inſpection, as *Juries* alſo do, which in Tryals by Witneſſes are, as aforeſaid, the more competent, &c. Of this Nature is a memorable Caſe of *Buſhel*, reported by Lord Chief Juſtice *Vaughan*, where *Meade* and *Penne*, two Quakers, were Indicted at the *Old Baily* for their Meetings; and the *Jury*, whereof *Buſhel* was the Fore-man, would not find them Guilty: The Court, mighty angry, Fined and committed the *Jury*, alledging for cauſe, That they (the *Jurors*) againſt the Law of the

the Realm, againſt full and manifeſt Evidence, and againſt the Direction of the Court, in matter of Law, to them in Court openly given and declared, had acquitted the ſaid *Meade* and *Penne*. But upon long and ſerious Debate, it was after adjudged, the Commitment, Fining, &c. was unlawfull, and accordingly the *Jury* were diſcharged, *&c.* Another time alſo a Jury-man diſſenting with all the reſt, and that no leſs than two days; the Judges asked him, what he would do? Says he, rather ſtarve, and dye in Priſon than conſent; the Court Fined and Committed him: But on better Conſideration, diſcharged him without more ado. All the Court can do, being only to (carry them in Carts, if in the Circuit, along with them, and) keep them without Meat, Drink, &c. till will agree, 41 *Aſſ.* 11. ſays *Mr.*

Jurors

Jurors ought not to be threatned, but to be free, differing in Opinion, &c, 273. And it was reſolved in Parliament, *Anno Dom.* 1677. That the Preſidents and Practiſes of Fining, &c. *Juries* in or for giving their Verdicts, are Illegal. And *Keeling*, Cheif Juſtice of *B.R.* was called to Queſtion in Parliament for ſuch Practiſes.

Coke upon *Lit. f.* 369. ſays, If any Labour a *Jury*, Inſtruct them, or put them in fear, or the like, it's Puniſhable as Maintenance or Embracery, either at Kings Suit, or at Parties; and perhaps, it would puzzle one to ſhew why a Judge is not within this Law; for how can he be ſaid to do this as a Judge, when to do ſo is no part of his Office? And why ſhould any uſage alter the Caſe here any more than in other Caſes of breaking the Laws; It's much

much too any Judge ſhould offer ſuch a thing, conſidering he that Judges without a *Jury*, certainly Judges without Authority: And he that Judges with a *Jury*, but governed or led by him, Judges only by colour of a *Jury*, and by colour of Authority: and thus makes himſelf forſworn in and by the Oath taken at his being Created Judge, makes the *Jury* all forſworn, violates the greateſt Priviledge of the Subject, infringes the moſt often confirmed Law of the Kingdom, and alſo does particularly the Party offended the greateſt wrong imaginable, in as much as by colour of Law, and makes all the *Jury* acceſſaries to the whole.

Hence it's improbable any Judge ſhould offer the contrary. But however, a *Jury* in any Indictment, Preſentment, or Information, ought, and

and may give their Verdict, &c. according to their own Conſcience, without any fear of Puniſhment one way or other.

And in any other Caſe, as where the King is no Party, but an Attaint happens to lye; they may be Puniſhed no other way. Alſo no Puniſhment whatever lyes for or againſt a *Jury* which conſiſts of above Twelve Men, 14 *H.* 7. 13. Nor does Attaint ever lye where the Witneſſes are not on Oath, or for going againſt what any ſuch Witneſs ſays; nor in any Appeal of Maim, Murder, or Felony, *F. N. B.* 107. Nor in other Appeals, as *Regiſt.* 122. *Attaint* 59, 62. & 22 *Aſſ.* 82. ſay. Nor does ever any Action lye againſt any *Jury* for going againſt their Evidence: And where an Attaint is brought,

it

it muſt be Tryed by a *Jury* of Twenty four Men.

The only Caſes the Judges have any Power over *Juries* in, are, where in their behaviours they become guilty of any ſuch thing as the Judges may juſtly call an unlawful contempt, 4 *E.* 4. 27. 36 *H.* 6. 27. Or be guilty of Embracery, 5 *E.* 3. *c.* 10. 34 *E.* 3. *c.* 8. as receiving Bribes, Promiſes, &c. before or at the Tryal, &c. *Or in Caſe of Concealment, The Juſtices of the Peace of every Shire, &c. may take by their diſcretion an Enqueſt, &c. to enquire of the Concealments of other Enqueſts taken afore them, and afore others, of ſuch Matters and Offences as are to be inquired and preſented afore Juſtices of Peace, whereof complaint ſhall be made by Bill or Bills, &c. And if any ſuch Concealment be found of any Enqueſt, &c. had or made within one year,*

&c.

&c. The Juſtices may Amerce or Fine them at Diſcretion.

3 *H.* 7. *c.* 1. *viz.* as much as is reaſonable for ſuch Offence; as is ſaid in a like Caſe by Lord *Coke*, 10. 140. and in *Dalton*, *p.* 541, 23. If any refuſe to be on a *Jury*, not offering ſufficient Excuſe, he is Finable, 7 *H.* 6. 12. So if any of either *Jury* give a Verdict, &c. as aforeſaid, twelve not agreed. So the *Grand Jury* may not diſcover Evidence given them, *Inſt.* 3. 107. *Mich.* 15 *Jac.* in *B. R. Smith* and *Hills* Caſe, 27 *Aſſ.* 63. *Lamb.* 402. *Chron.* 207, 272. *Finch* 29. So the *Petty-Jury*, if without Licenſe of Court, depart any whither upon any occaſion whatſoever, after ſworn, before Verdict given: Or that while, but eſpecially after Evidence given, eat or drink: Or out of Court receive any Evidence from

from either ſide, may expect Fine and Impriſonment.

Thus much for what a *Jury* may do: Now ſomething more how, and what it ought to do. The Oath it ſelf, but that it's ſo general, would elſe be Inſtruction as well as Obligation ſufficient. The Oath of a *Grand Jury-man* is, *I will diligently enquire, and true Preſentment make of all ſuch things and matters as ſhall be given me in Charge, or ſhall come to my knowledge concerning this preſent Service. The King's Council, my own and my fellows,* I *well and truly will keep ſecret. I will* Preſent *nothing for Malice, Lucre, or evil Will: Nor will I leave any thing unpreſented for Love, Favour, Affection, Reward, or any hopes thereof. But in all things that ſhall concern this preſent Service, I will preſent the Truth,*

Truth, the whole Truth, and nothing else but the Truth. So help me, God. The Oath of the *Petty Jury* is, *I will well and truly Try, and true deliverance make between our Sovereign Lord the King, and the Prisoner at the Bar, according to my Evidence. So help me, God.* That of the *Grand-Jury* was part of it Anciently, *Quod neminem accusare velint innocentem*, To Accuse no Person innocent, *Ll. Ethelred.* And *pour rien ne levray que je verite ne diray.* Nothing shall hinder me from speaking the Truth, *Brit.* 12. 135. *Crompt.* 304.

The Scripture teaches one his Duty upon an Oath. It says, *One must swear in Truth, in Justice, and in Judgment, Jer. c.* 4. *Deut. c.*16. *Exod. c.* 20. *Dan. c.* 5. *Levit. c.* 14. *Zech. c.* 13. *Acts c.* 5. and the *Proverbs* in several places. *In Truth,* with

with one's Eyes, neither in a Teleſcope nor Microſcope; not proceeding by appearance or ſeemingneſs of things, not by adding or diminiſhing, not by aggravating or palliating, not by Equivocation or Reſervation, not by Repreſenting or Accepting the matter otherwiſe than really and truly it is, not preſenting, *&c.* things, *&c.* doubtful, or not certainly true, as true; nor omitting any thing certainly true, but always as the naked Truth is, ſo and ſo *In Judgment*, not at a venture, as by caſting Dice, *&c.* not as matter of Form, not raſhly, perfunctorily, or negligently paſſing or running over things, not by implicite Faith, or in complemental Obedience, *&c.* not upon truſt or belief, further than with, and upon good and great deliberation, conſiderateneſs, Reaſoning, and Satisfaction according to one's own Conſcience, and becauſe one's mature and ſettled judgment is

ſo

ſo and ſo. *In Juſtice*, proceeding fairly, impartially, with Integrity, and according to the Merits of the Cauſe, without charging one with Murder that's Guilty, but of Manſlaughter; and without Malice, Fear, Hope, Pity, Favour, Affection, Paſſion, Corruption, or other Prejudice, Byas, Conſideration, or private or ſiniſter End or Deſign. But all throughout purely, becauſe Juſtice is ſo and ſo more than otherwiſe. And conſonant to Scripture, as well as generally in all other things, ſo alſo in this are even Morals and Politicks. The Wiſe Men (ſo called) of *Greece*, were called ſo from their living Prudently, Juſtly, and Honeſtly; ſuch alſo are they *Ariſtotle* calls ſo, 1 *Metaph.* &c. The *Stoicks* ſay, He's the Wiſe Man that ſticks to Truth, *Neque quidquam fingit*, and abhors and baniſhes every thing elſe, not ſo much

much as admitting of any Stories, Fictions, &c. whatsoever. *Machiavel* says, *Judex cujusquam gratiæ nec potentiæ cedet, neque misericordia nec invidia nec odio comovebitur sed vere semper & incorrupte ex legibus judicabit.* Judges must not be moved for the Power of any one, nor for any ones sake, one way or other, nor with Pity or ill will, but always go according to Law, truly and without byas. *Justinian* speaking of Judges, says, *Eorum est manus puras Deo, Imperatori & legi præstare,* They must be inoffensive to God, the King, and thē Law. *Non illum populi fasces, non purpura regum flectunt,* No Acclamations of the People, no Honours of the King, neither of these move them. *Contra rempublicam, nec contra jus jurandum amici causa, vir bonus non faciet.* Against the common good or an Oath, no Man will stir an inch,

inch, if honeſt, though it be for a Friends ſake. *Judex ponit perſonam amici cum Judicis induit.* Judge *Hales* is a Friend, as *Hales*, but none as a Judge. *Si omnia facienda ſint quæ amici velint non amicitiæ tales ſed conjurationes putandæ ſunt. Cicero.* What a Judge does at the requeſt of his Friend, is really and truly no Friendſhip, but is making himſelf and Friend guilty both of a Crime. The *Areopagites* (were Judges that) heard Cauſes only in the dark, that they might take notice what was ſaid, and not who ſpoke. And what is ſaid of Judges by theſe Authors, muſt by us in like manner be applyed to *Juries.* The Book whereon Swearing one lays one's hand, is God's Everlaſting Truth, and moſt Holy Word; ſo that if one forſwear one's ſelf, one virtually in ſo doing utterly forſakes God, and his Mercy and Truth.

Says a Learned Man, part of the Oath is, *So help me God, viz.* I pray God he will never help me, if I ſhall not ſincerely and faithfully keep this my Oath. *Cajetanus* ſays, 2 *Qu.* 98. Perjury is of its Nature a contempt of God. And as the Proverb ſays, *Malum eſt ludere cum Sanctis.* It's however ill jeſting with edge'd Tools.

By the Oath of the *Grand Jury*, one's bound to obſerve as well the Charge which ſhall be given by the Court, as the form of the Oath it ſelf. But this it's plain muſt be underſtood ſo far as the Charge is according to Law, and not contrary or repugnant to the Oath it ſelf, and no further or otherwiſe.

Anciently the Charge was given in Writing to the *Jurors*, *Brit.* 9. *Bract. l.* 3. *c.* 1. *Dalton, p.* That the

the *Jury* might eaſier remember it, their Minds be refreſhed, and perhaps, themſelves Edified, &c.

What the *Grand Jury* does, is by way either of Preſentment or Indictment. *By Preſentment*, when they know of a Crime or Fault themſelves, and give a ſhort Note of the Parties Name, place of Abode, and Fault, without Form, referring it to the Court to put into Form. *By Indictment*, when the Party and Fault are ready brought them in Parchment, drawn up in Form. And indeed the moſt true difference is only, that the one is in Form, and the other not.

In an Indictment, firſt they muſt conſider and underſtand it well and throughly: And if they can't underſtand it, ask the aſſiſtance of the Court, either to give them a

Clerk on Oath to *Engliſh* it for them, or otherwiſe as need ſhall require. Then they muſt conſider if the Fault, as alledged with the Circumſtances and Aggravations, amount to, and be a real Fault or not, and alſo worth complaining of; for *de minimis non Curat Lex.* The Law minds not every little thing, and this is daily experienced in Indictments and Ac. of Caſe. If it be no Fault, or one not worth complaining of, which in Law, as aforeſaid, is all one, they reject the Bill, and meddle no more with it. If they find it a Fault, and conſiderable, as aforeſaid, then they conſider, if know it true ſo of themſelves; which if they do, or other Evidence ſatisfie them it is, they Indorſe, or write on the back-ſide of it, *Billa vera*, this Bill is true: But if they do not know it themſelves, nor be ſatisfied by the Evidence, then

then inſtead of *Billa vera*, they write *Ignoramus*, We know not. And afterwards thus deliver all the Indictments into Court.

The Clerks of Court, to get Fees, and perhaps, ſome others for one ſiniſter end or other, will be apt to ſay, that the *Grand Jury* ought to find an Indictment, or make a Preſentment againſt any ſuppoſed Offence or Offender, though have but colour of Evidence, or a probability of the thing being true, and that what they do, is but matter of courſe, a Ceremony; matter of Form, barely an Accuſation, *&c.* But that this is not ſo indeed is apparent, for to what end then is a *Grand Jury*? Only for ſhow. The Law would certainly then have never required one to be at all: We ſee they are obliged to be ſworn, and they are as much on their Oath

as any other *Jury*, which then ſhould be the contrary. The very form of their Oath teaches us better. The Oath is, *Diligently enquire*, &c. not *negligently*, &c. *True Preſentment make*, not *probable*, &c. *Nothing for lucre*, &c. not excepting the Clerks, &c. *According to Evidence*, not *Preſumption*: *The whole Truth*, *and nothing elſe but the Truth*, which how can be at ſuch a rate as the Clerks, &c. ſpeak of?

But then they Object, that theſe words, *According to the beſt of one's Knowledge*, are added. If they be, it's againſt Law, *Mir.* 304. *Brit.* 12. 135. And altering an Oath, is impoſing a new one, which cannot be without an Act of Parliament, *Inſt.* 2. 479, 658, 719. But however, May *Jurors* in ſuch caſe wink, &c. that they may not know, &c.

Theſe

Theſe words are *beſt of*, &c. and not *worſt*; they are *Knowledge*, not *Ignorance*; they imply the *beſt* one *can* know or find out: And not only what one already *does* know, for then what need the word *beſt*? And beſides they relate to the word *enquire* as well as any other word, &c. So the more one conſiders them, the leſs one ſhall find they really alter the Oath.

Then, ſay they, all a *Grand Jury* does, is but preſenting in form, and not in form as aforeſaid, and is only ſuppoſitious as it were, and nothing poſitive or as certain, grounding themſelves only on this, that the form of the Indictment is, *The Jury upon their Oath Preſent*, inſtead of *The Jury upon their Oath ſay*; and ſo infer, that if any thing in the Preſentment or Indictment be falſe, yet it's

no Perjury. Alas, to ſee Men in extremity what hold they'l catch at! Could *Argus* himſelf have ſeen this Exception? No, unleſs blind. *Preſent* and *ſay* are undoubtedly here, and in ſuch like Caſes, Synonymous terms. To *Preſent* on Oath, is to give the Court to underſtand on Oath: And to *ſay* on Oath, is to tell the Court on Oath; and an infinite of Indictments be *ſay* inſtead of *preſent*, *Raſt.* 263. *Kitch.* 100. *Co.* 9. 114. And *Fleta* goes ſo far, as calls an Indictment a Verdict, *f.* 113. The words alſo of the Oath be, *to truly Preſent*, and not *ſay*. And Lord *Coke* plainly calls the *Grand Jury-men* all willfully forſworn and Perjured, if wrongfully find an Indictment, *Inſt.* 3. 33.

Then, ſay they, but Indorſing *Billa vera*, as aforeſaid, implies not

not that the *Jury* takes upon them to know or ſay the Bill or the contents are true; but *vera* there ſignifies probable, or fit for Enquiry. But then, why not another word uſed more properly and uſually *Latine* for ſuch a ſence than, and inſtead of *vera?* And what is *Latine* for true, if it be not? And is not true the common accepted *Engliſh* word of and for *vera?* And is not *Billa vera* the Anſwer made to their Oath, that they ſhall true Preſentment make? This is like the reſt.

Then, ſay they, this is no Tryal, but in Order to bring to Tryal, and the Party is at no prejudice if the Bill be found. It's true, it's no determinative Tryal that finally concludes either Party, becauſe it's but one of two which every one accuſed of a Crime muſt have as aforeſaid. But it's ſo much a Tryal, as

Learned *Fleta*, *f.* 113. looks upon it no leſs one than any other. The form of their Indictment is the ſame of that of a Verdict. All things are, or ought to be alike in the whole proceedings, and to differ nothing, but the one to be before the other, and the later to be final, the other not. The *Stat.* of 23 *H.* 8. *c.* 23. Enacts, One ſhall be Indicted of High Treaſon in what County the King pleaſes. And the *Stat.* 1, 2 *P. M. c.* 10. ſays, That Tryals for Treaſon, ſhall be according to Common Law: This Act repeals the other, though ſpeaks only of Tryals, and the other of Indictments, *Anderſ.* (1.) 104, 105. *Inſt.* 3. 27. which ſhews an Indictment is a Tryal. One of the *Grand Jury* can't be afterwards on the other. And why? Says the Law, for he has once already found the Party Guilty, and if ſhould not

again,

again; he muſt Perjure himſelf, *Brit.* 12. 25 *E.* 3. *c.* 3. 7 *E.* 4. 4. *Stanf.* 158. It puts the Defendant to Diſgrace, Trouble, Damage, Danger of Life, &c. It makes him lyable to an Out-lawry, to Impriſonment, &c. and to every thing but very Death, &c, the final Judgment it ſelf. It gains Credit, and gives Authority to another *Jury* to find one Guilty. It produces this Effect, that if the other *Jury* find one guilty never ſo wrongfully, no Attaint lies againſt them, nor other Puniſhment. And what's the Reaſon? The Law ſays, becauſe he is found Guilty not by theſe other twelve only, but in all, by Twenty four or more, this later and the other *Jury* too, *Attaint* 64, 60. *Attaint R. a.* 18. *v.* 8 *H.* 4. 23. [b] 14 *H.* 7. 13. So if one be Indicted, any one may bring an Appeal, though never ſo wrongfully,

fully,&c.againſt him,whereas he that brings one againſt any one that was never Indicted of the ſame Offence, may be lyable to great Puniſhment, if wrongfully brought, *Stanf.* 172.[b] *Coron.* 178. 40 E. 3. 42.

Where Peers be indicted for Treaſon, Felony, or Miſpriſon of either, they not only ſuffer in Honour, Liberty, Vexation, Danger, Trouble, Charges, and other Inconveniences, as aforeſaid, another does, but muſt with a more tender ſenſe, and in a much greater meaſure, as they be ſo much greater perſons, &c. And they can have no other Tryal on Oath, for their future Judges or *Jury* are none of them on Oath, *Inſt.* 3. 89, *Co. L.* 156. They can except againſt none of their *Jury*, though have what Cauſe ſoever poſſible, *Co. L.* 156.[b] They muſt be Tryed by ſuch as ſhall be choſen againſt

againſt them, ſuch, as perhaps, ſhall not be Neighbours, but picked any where up and down the whole Kingdom; ſuch a *Jury*, as perhaps, ſhall not be above twelve in all, whereof then if any ſeven, or any time the major part agree to find them Guilty, it ſhall be ſo, though the other five, or leſſer number be utterly againſt it. So that upon the whole, if a Peer have but ſeven Peers among all the reſt that bear him ill will, or either any ill wiſher that can make him ſo many of them his Enemies, he muſt Die, &c. fall back, fall edge. And to help the matter, he ſhall always be ſure of the ableſt Councel in the Kingdom to manage the Cauſe againſt him.

Suppoſe one ſhould ask any Honeſt Man this Queſtion. Were he not on his Oath, yet would he find an

an Indictment of courſe, &c. to expoſe one, and put him to ſuch Inconveniences, as aforeſaid? Certainly, ſays he, no. And the Monſter that would, does it wrongfully, becauſe is not certain he does otherwiſe. And being on his Oath, as aforeſaid, it's not only doing wrong, but tainting himſelf Crimſon-red in Perjury too; ſure a Malicious way of doing wrong. It's doing wrong alſo by colour of Law and pretended Authority, the greateſt Miſchief and Injuſtice, ſays the Lord *Coke*, of all other, *Inſt.* 2. 48. The damage, &c. too in all theſe Caſes is the greater yet, that the Party can very ſcarcely, if at all, expect any Reparation or Amends: Whereas in all other Caſes he may eaſily. For againſt the *Grand Jury*, or any of them, no Action lyes, in as much as doing what they do on their Oaths; the Law will not

preſume

preſume, &c. any Malice, &c. in them. And though one be Indicted at the Inſtance, or upon the Endeavours of ſome other Perſon (all the *Jury*, as aforeſaid, being ſworn to Secreſie) can one eaſily diſcover, and prove who this Perſon is, what he did, and prove it at a Tryal? Which yet one muſt do fully, if expect any thing but making bad worſe. And might one recover damage, &c. yet it's damage, &c. to be put to the trouble and hazard of the Recovery. Well therefore, ſays *Fleta*, *f.* 52. *Valde neceſſarium eſt in omni preſumptione in inquiſitione de vita & membris Juratores diligenter examinare.* It's an exceeding neceſſary thing that the *Grand Jury* ſhould make diligent Examination, before preſume any thing, either in Caſe of Life or Member. *Juſt. Dalton's* Book, *p.* 539. ſays, no leſs care or concern

cern at all lies on the *Grand Jury* than does on the *Petty Jury*.

The Law (to see its Nature, how it inclines generally, that one may the better guess in this matter) it is not with us like those of *Draco*: It's as tender of the Lives, Liberties, and Credits of the People, (none can deny in all Cases else) as a Mother of her Child, and why then not in this also? It will presume nothing dishonest, &c. in any one, or any time, but it will, and always does presume all Persons and things Honest, True, Innocent, &c. till the contrary be proved, *Co. L.* 78. *b* As *Ovid* says, *Sit piger ad pœnas princeps ad præmia velox.* So *Lamb. Sax.* Laws cry often Clemency and forgiveness as well as Justice. And *Lex Angliæ Lex misericordiæ est.* Says *Coke*, *Inst.* 2. 315. Like the Laws of Scripture, whence

whence it was firſt derived, which ſhews Mercy is not oppoſite to, but part of Juſtice, 1 *John* 1. 9. *Pſal.* 71. 1, 2. *Jer.* 18. 7, 8, 9, 10. *Ezek.* 33. 13, 14. The Laws of *England*, the Laws of Mercy. And ſays a Great Man, *Juſtitia ſemper mitiorem ſequitur partem.* Juſtice leans that way which is the milder, One brings an Appeal, if the *Jury* be doubtfull, the Defendant ſhall be acquit, and the Appellour Impriſoned, *Fleta* 52. *Mir.* 224, 273. So a *Jury* being doubtful if one were a Villain or not, was therefore free, *Fleta* 238. *Bene tibi præcipiunt* (ſays *Cicero*) *qui vetant quidpiam agere quod dubites æquum ſit vel iniquum; æquitas enim lucet ipſa per ſe, dubitatio autem cogitationem ſignificat injuriæ.* They do well, that forbid one doing a thing when dubious, whether right or wrong; for where it's right, the thing is neceſ-

neceſſarily as clear as the Sun. But any doubt ſpeaks the thing not to be ſo. As if a Phyſician give one Phyſick, he muſt give one that he is ſure will do one good, or no harm, and not what he doubts may do one harm. It's alſo plain, if I doubt, I muſt not ſay, I am certain (as *Billa vera*) but I know not certainly (as *Ignoramus*) elſe I tell a Lye. It's very remarkable too about all Indictments, the *Jury* only ſays, either *it's true*, or *we know not*, and never that *it is not true*, which ſhews, if they be doubtfull, or not fully ſatisfied, the Indictments muſt be Endorſed not *Billa vera*, we know it is true, but *Ignoramus*, we do not know it is true. And the Law does not put it upon the *Grand Jury* to ſay the Bill is not true, if they do not find it, though does put it upon them to ſay poſitively, the Bill is true, if they find it, and ſo encourages

encourages the finding Indictments *Ignoramus*. *Forteſc.* ſays, It's better Twenty ill Men were unjuſtly ſaved, than one unjuſtly Condemned, 62. For Mercy and Pity is on the one ſide, but on the other Injuſtice and Cruelty. Says *Bracton*, *Tutius eſt reddere rationem miſericordiæ quam Judicii.* It's ſafer giving an Account of one's being Merciful, than otherwiſe. The *Saxons* in doubtful Caſes only Appealed to God for Diſcovery, and left all only to him, *viz.* Where the Caſe was doubtful, if Guilty or not, or clear and manifeſt Proofs wanted, they had four ſorts of Tryal, *Spec. Sax. l.* 1. Firſt, *Kamp-fight*, or by *Battel.* Secondly, *Fire-Ordeal*, by holding red-hot Iron in his Hands, or walking bare-foot over it. Thirdly, *Hot water-Ordeal*, by putting one's Arms up to the Elbows in ſeething hot water. Or, Fourthly,

Cold

Cold Water-Ordeal, by caſting one into the Water with a Rope under his Arms. Whereof the three laſt were uſed, one or other of them, where the Party was more vehemently ſuſpected; *Verſteganus* and others. But Pope *Stephen* the 2*d*. by his Decree utterly aboliſhed them all, and afterwards ſo did the Parliament, 3 *H*. 3. *Memb*. 5. Judging it more fit the Party ſhould be acquitted than proſecuted where the Caſe was doubtful. So that one muſt know beyond all doubt, before ſay *Billa vera*, elſe ſay *Ignoramus* which is in *Engliſh*, we doubt, we do not know, we are not certain if it be true. *Paribus ſententiis reus abſolvitur*, *Inſt*. 4. 64. And ſays *Brit*. If a *Jury* doubt at any time, they muſt find for the Defendant, 245, 130, 136, 219, 213. Judge

But a Jury firſt paſt upon them, *Rot. Temp. R*, *S. Jo.* Lord *Hales* his Collections.

Frebern

Frebern was Hanged for Judging one to Death, where the *Jury* were doubtful in their Verdict, *Mir.* 298. Anciently if a *Jury* Indicted an Innocent Man, another might be impanelled to go upon this *Jury*, as Offenders, &c. *Mir*, 101. *Auſſi ſont homicides de volunt, faux Jurours & ceux que Endictent fauxement.* Jurors that falſely Indict any one, be guilty of wilfully killing Men, *Mir.* 34, 36. They ſhall be reputed and adjudged Infamous, and ſuffer Corporal Puniſhment, that find an Indictment againſt an Innocent Perſon, *ibid.* 251, 252. 254. 256. Or if an Innocent Perſon be adjudged to Death, &c. if they could have holpen it, *ibid.* 256. An Appeal lay againſt a *Jury* in ſuch Caſes, *ibid.* 136. *Brit.* 14, 137, 237. If they any wiſe offend ſo, *Ignorantly*; yet this excuſes not at all, unleſs they could not poſſibly know better,

better, *ibid.* 257. And negligence in or of knowing better, makes their fault the worſe, *ibid.* And the greateſt Oracle of our Laws, *Co. L.* 115, 391, 45, 94, 113. has it, That what ever was Law, is yet, unleſs altered by Act of Parliament, which this never was. Whereas on the other ſide, if a *Grand Jury* do not find the Bill againſt any one, there can be no harm then to any body; but another Indictment may ſome other time be brought when there's better Evidence, or a worſe *Jury*. For though one's Life, *&c.* ſhall come but once in danger, or on Tryal before the *Petty-Jury*, it may yet a Thouſand times before the *Grand Jury*, for they never ſay the Party is not Guilty, but at moſt only ſay *Ignoramus*, as aforeſaid.

Any thing any *Jury* does, ought to be *Quoddam Evangelium*, like what

what they laid their Hands on, taking their Oath. When they write *Billa vera* on an Indictment, they undeniably compare the truth of the contents therein to the truth of the Goſpel, and this upon Oath. Thus one would admire how it comes to paſs, that they of the *Grand Jury* ſhould often hear but one ſide. Their Oath, it's apparent, is againſt this. It ſays, *Preſent the whole Truth*, not concealing or omitting any part of it; which implies as well all one ſide can inform them as the other. And ſo appears by leſs ſtrong Caſes far. An Attaint lies againſt a *Jury* (ſwearing to well and truly Try the iſſue between the Parties) when every word of the Verdict may yet be true, only it not being the whole Truth. As if one having had common appendant time out of Mind, bring an Aſſize of the Common, making

making his Title that he hath had common time out of Mind, &c. (without ſpeaking of the Appendency) and ſo the *Jury* find for him. For thus he ſhould elſe have Common in groſs, when his Right or Title is not to *ſuch*, but to Common Appendant, *F N B.* 107. *a.* 10 *E.* 4. 17. 49 *H.* 6. 17. So one having had a Rent in Fee, as Foreſter of ſuch a Foreſt, time out of Mind; in an Aſſize for it, makes Title by ſaying he had a Rent out of that Land, time out of Mind, &c. (without ſaying, as Foreſter, &c.) and the *Jury* find for him, for he hath not had the Rent by Preſcription, as muſt be underſtood by the Claim and Verdict, as aforeſaid, *ibid. b. Co.* 5. 78, 79. So that it is not enough for a *Jury* to ſay the Truth, but the whole Truth, though too no ſuch word as this of whole Truth, be mentioned in the Oath.

Oath. It proceeds, and ſays, *and nothing elſe but the Truth*, which how can poſſibly, or any *Jury-man* be ſatisfied in, unleſs hear both Parties? It ſays, *You ſhall diligently Enquire*, &c. not by halves, or but hearing one ſide only. It's a Maxime, *Qui ſtatuit aliquid parte inauditâ alterâ æquum licet ſtatuerit haud æquus fuerit.* He that Judges or determines any thing when but one ſide only is heard, does unjuſtly: And the Judgment, or Determination, though in it ſelf be never ſo juſt or right, yet ſhall he no wiſe be accounted a Juſt Judge, &c. Is it not a common ſaying, *One Tale is good, while another is told?* One at this rate might be Indicted for a Cut-purſe, when but an Honeſt Glover; ſo might Surgeons, Sheriffs, Bailiffs, Jaylors, Hang-men, Attorneys, &c. for but doing what belongs to their ſeveral and reſpe-

ctive Profeſſions, as the matter may be managed, and yet ſaying nothing but Truth neither, only not the whole Truth. Is there not in all Determinations elſe, the Hearer and *Defendant* as well as *Complainant?* Thus erred *Judah* the Son of *Jacob*, in Judging *Thamar* to be Burnt, upon Report, when ſhe was unheard, *Gen.* 38. 24, 25, 26. So was *Joſeph* falſely accuſed of Lying with his Miſtreſs, and caſt into Priſon, *Gen.* 39. 19, 20. So was *Mephiboſheth* falſely Accuſed by *Ziba* and deprived of all he had, 2 *Sam.* 16. Which being all Preſidents, and Damned in Scripture, muſt, or ſhall any one be ſo hardy as to embrace and follow them now? Either one's Guilty or not; if be, let him yet have fair play for his Life, &c. If not, why ſhould he then be Indicted? So that, why ſhould he not be heard? Elſe one's Condemned firſt, and heard after; or indeed Hanged

Hanged firſt, and Tryed after, or little leſs. The true intent of the Law herein ſeems, as if Men were to be handled not thus, but that the Defendant ſhould be heard at firſt, that if he then could give ſatisfaction, &c. he might be at no further trouble, &c. And if he could not, that he ſhould have ſuch trouble, &c. and having notice thus, might prepare himſelf the better, and ſo not be ſurprized at the final and concluding Tryal, or have any colour of pretence that he was ſurpriz'd, or any wiſe unprepared at this final Tryal This method being moſt honourable for the King and the Law, and alſo moſt ſafe for the People. And the Reaſon why it was ever otherwiſe, ſeems barely a Reſult of ſome Artifice of the Clerks, to get themſelves Money, impoſing on the *Juries*; or from this, that Preſentments being made without the Party heard, therefore the *Jury* thought they

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Hanged

Hanged firſt, and Tryed after, or little leſs. The true intent of the Law herein ſeems, as if Men were to be handled not thus, but that the Defendant ſhould be heard at firſt, that if he then could give ſatisfaction, &c. he might be at no further trouble, &c. And if he could not, that he ſhould have ſuch trouble, &c. and having notice thus, might prepare himſelf the better, and ſo not be ſurprized at the final and concluding Tryal, or have any colour of pretence that he was ſurpriz'd, or any wiſe unprepared at this final Tryal. This method being moſt honourable for the King and the Law, and alſo moſt ſafe for the People. And the Reaſon why it was ever otherwiſe, ſeems barely a Reſult of ſome Artifice of the Clerks, to get themſelves Money, impoſing on the *Juries*; or from this, that Preſentments being made without the Party heard, therefore the *Jury* thought they

might find an Indictment likewiſe. Whereas they ought always to diſtinguiſh; for a Preſentment is on their own knowledge, when they know all the whole matter, even what the Defendant can ſay for himſelf; but an Indictment is found upon Witneſſes, which tell their tale to a hairs-breadth, &c. as makes the moſt for the ſide they are produced of. And at length, after ſome few Preſidents, it has now grown into Practice. *Dato uno abſurdo mille ſequuntur.* All can be pretended why it ſhould be ſo now, is but Practice and Preſident. And when it's againſt Juſtice, againſt Truth, againſt any ones Judgment, ſure one ought rather to Correct than approve of, or follow ſuch Practice or Preſident. At leaſtwiſe a *Grand Jury* ought hear both Parties, if preſent, or eaſily, or conveniently to be heard.

It

It would likewiſe amaze one to ſee how the Clerks, for their gain, or others for other Ends, have often prevailed with Jurors to find a Bill true, &c. when in all the Circumſtances of Aggravation, or moſt of them, falſe, if not in the Fact it ſelf; and thoſe Circumſtances too altering the very Fact as alledged about as much as white Feathers would a black Crow.

Conſidering how true Preſentments, Indictments, and Verdicts ought to be, and that the whole Truth, and nothing but the Truth muſt, or may be in them: That the *Jury* undertake the Bill is altogether true, not only as to the ſubſtance, &c. or in general, but even in every particular, all the Circumſtances, Aggravations, and every individual word (for if it be not true in the leaſt word, it's not true,

but falſe, and Perjury.) *Stanf.* ſays well, *f.* 96. [b] *De faire bon Enditement eſt requiſite á conuſtre & d'aprendre que ſera dit Treaſon ou Felony ou non.* To perform the Duty of one on the *Grand Jury*, it's neceſſary to learn and know what's called Treaſon, what Felony, &c. and what not: Hence alſo one learns, one muſt not in an Indictment, &c. call, or ſuffer called Felony, Treaſon; Man-ſlaughter, Murder; nor one Crime by the name of another: Or mention, or ſuffer mentioned, words ſpoke, or things done, other or after another manner than really and truly were ſaid or done; and therefore the Judges give the *Grand Jury* to this day their Charge ſo diſtinguiſhing, particular, and directive of all, and all manner of the ſeveral Crimes, their Natures, and how to call them, &c.

When

When the Clerks draw an Indictment, Information, &c. they'l not only alledge and inſert in it the very Fact, &c. one is accuſed of, but craftily, and full of Art ſtuff and load it, into the bargain, with ſeveral fictitious and ſleigh allegations of their own, to ſwell up, and aggravate the matter; as Circumſtances of Malice, or deſign, &c. in the Party when did the Fact, ſpoke the words, &c. So that ſometimes from a Mouſe, a Mountain; from nothing, or what's inconſiderable, it will in ſuch a dreſs ſhew and ſtrut like a Giant, a Monſter, &c. And all this, forſooth, they'l call matter of Form, and then endeavour to perſwade a *Jury*, if they find the chief matter, or that part which they'l call the matter of Subſtance, true, they muſt of courſe find all the reſt which *they* pleaſe to call matter of Form, true alſo.

This uſual way of wording Indictments, is ſo notorious, dangerous, hurtful and grievous, that it ſeveral times, and in all Ages has been complained of by all Perſons whatſoever, except the Clerks and Proſecutors themſelves, whilſt Clerks and Proſecutors. It has been a Complaint in and of Parliament, by King, Lords, and Commons. See 4 *H.* 4. *c.* 2. 37 *H.* 8. *c.* 8. This is that whereof may be ſaid, as was in *Courtin Hertſey*'s Caſe, *Aliquid creare ex nihilo malum, Diabolicum eſt.* It's the part of the Devil himſelf to make a ſmall fault be, or ſeem a great one. But no Complaint, no Argument will, or can prevail with a Covetous Clerk getting Fees, or a Malicious Proſecutor troubling whom he has Envy or Malice againſt, to deſiſt their Advantage. And as the true Circumſtances of any Crime do always, or

moſtly

moſtly aggravate or alleviate it, and all thoſe ſuggeſted thus by the Clerk, if the Bill, &c. be found by the *Jury* (though pretended only matter of Form) become thus as true, and the Judges muſt adjudge a Puniſhment accordingly, as if all were really true: Thus is a Trap ſet to catch the *Jury* and Defendant; the *Jury* to Perjure themſelves, and wrong the Defendant, and the Defendant to be adjudged of a Crime, when perhaps, guilty of none, or at leaſt of a worſe Crime than truly he is. A *Jury* therefore ought firſt conſider, as aforeſaid, if the matter of Subſtance or chief matter be Criminal at all; and if be, then if conſiderable: And if be not Criminal, or conſiderably Criminal in it ſelf; then if the Circumſtances, as alledged, make it ſo; and if not, then to reject it. If it be conſiderably Cri-

minal with or without the Circumſtances, then conſider if you know it of your ſelves, or by Evidence be ſatisfied it is true, both it ſelf and the Circumſtances: If the matter it ſelf be not true, you reject the Bill (for where's no body is certainly no ſhadow:) If the matter be true, but the difficulty be about the Circumſtances, then conſider if they be material; if not, you find the Bill; if be, then conſider if they be conſiſtent, or the matter will bear them; if not, then reject the Bill, &c. or at leaſt ſtrike them out of the Bill, &c. If be, then conſider if they be true on your own knowledge, or by the Evidence given you; if be, then find the Bill, &c. if not, they muſt be ſtruck out, or the Bill return'd *Ignoramus*, &c. As for Example, The *matter* muſt be *Criminal and conſiderable:* This partly appears before; but further, Suppoſe

poſe the Apprentice of *A.* get a Woman with Child, and ſecretly run away upon it, and *A.* procure a Warrant to Apprehend him for it: But *B.* a ſtranger knowing of the Warrant, Lodges, Comforts, and Aſſiſts the Apprentice in unknown places, that the Warrant can't be ſerved; the ſtranger is not puniſhable, 15 *Jac. B. R. Vaughan*'s *c.* If a Commiſſion be granted to two, and one of them execute it alone without the other, and accordingly Fine people, &c. yet no Indictment lies, for it was Error of Judgment, 27 *Aſſ.* 23. If one ſay to a Juſtice of Peace, Executing his Office at his Houſe, &c. and not on the Bench, certain ſcandalous words touching his Office of Juſtice, yet he may not be Indicted for it, *Hides c. Trin* 11. *C.* 1. *B. R.* And ſo was Sir——*Sackfield*'s *c.* theſe being all inconſiderable faults. And as to whether *the Circumſtances*, or

other.

other matter than the Principal *be material or not*. Thoſe words or parts be only words of Form, and but thoſe only which are neceſſarily implyed, as that if the Principal or the reſt be true, theſe muſt be ſo too, and can't poſſibly be otherwiſe, and thus become needleſs to be proved, being before proved, as and by the neceſſary conſequence of the other Proof; ſo he that proves a ſhadow, proves alſo a body, ſince there muſt be a body to cauſe it: and thoſe words be material which may cauſe a different Judgment or Puniſhment, or that aggravate the fault, make it greater, of another nature, or any wiſe alter it, and therefore are not to be preſumed, but muſt be proved. The *Jury* muſt obſerve alſo *whether conſiſtent* as an Indictment of or for Felony, ſaying, that one ſuch a day Feloniouſly cut down ſuch Trees, and carried them away; or with Force and

Arms

Arms ſuch a day cut down ſuch and ſuch Trees, and Felonioufly carried them away; this is inconſiſtent, for Felony can never be about ſtanding Trees, *Indict.* 4. So of growing Apples, of Houſes, or any thing fixed to the Free-hold: But all it can amount to, is only Treſpaſs, unleſs the falling appear by the Indictment to be one time, and the carrying away, another. So if a Mad-man, a Child, &c. which have no diſcretion, be ſaid to do things malicioufly, or deſigning any thing, this is inconſiſtent or impoſſible, in as much as no Malice or Deſign can be in ſuch. *If neceſſarily implyed, for if be not, they muſt be proved*, &c. Every *Jury* muſt go by *probata*, what's proved, as well as *allegata*, what is only alledged. Where one's Accuſed of knowingly keeping a Dog wont to worry Sheep, &c. the knowledge muſt be proved as well as the reſt, *Cockram* and *Davies*, *c.*

B. R.

B. R. 17 *C.* 1. So the Lord *Shaftsbury*, when ſued Lord *Digby* for maliciouſly ſpeaking ſuch and ſuch words, he proved the malice as well as words. If one pleads a Feoffment by Deed, and the other denies it, it muſt be proved to be by Deed, *Co. L.* 281.[b] So if one be Indicted of Murder, as that he with Malice, Fore-thought, killed ſuch a one, the Malice fore-thought muſt be proved; for in theſe Caſes the killing might be either by chance, as the glance of an Arrow, &c. by giving Phyſick, by a Champion in Tryal by Battel, by a Hang-man doing his Office, or by one *non Compos mentis*, &c. In which Caſes is no Malice, and therefore the Indictment not to be found: So the words might be ſpoke in Jeſt, or a Thouſand other ways, and not maliciouſly. So one might keep ſuch a Dog, and not know he was ſuch,

and

and the fault would then be none at all in him. The Law alſo may ſeveral times be broke in the letter, yet without any fault, if the intent of the Law be not broke: As when things are done to avoid a greater inconveniency, or by compulſion, or for neceſſity, or by involuntary Ignorance, &c. And in theſe and ſuch like Caſes the Party ought not be Indicted, though the matter be true in it ſelf. The *Romans* had a Law, *He ſhould dye that climbs over the Wall in the Night*; yet one doing ſo to diſcover their Enemies, was by the Senate adjudged Innocent, and Rewarded. So it's Lawful with us to pull down another's Houſe when a Fire happens, or in time of War, to prevent a greater Miſchief. So one being to appear to a Writ, but hindred by Floods, Sickneſs, &c. does not, he is Excuſed: One forces and uſes one's hand

hand to kill a third Perſon, he is only Guilty: So an Infant, or one *non ſanæ memoriæ*, kills another, it's excuſable. So that where any Fact or words in an Indictment might be as well under any of theſe Circumſtances, as what other the Clerk or Proſecutor is pleaſed to alledge, theſe alledged muſt be proved, for it's plain, are not neceſſarily implyed. And yet if a Man ſhould do any wiſe thus, the Clerks will draw up the Indictment or Information as if none of theſe Circumſtances were in the Caſe, but that it was Maliciouſly in contempt of the Laws, &c. So it ſeems hard a Man ſhould be Hanged for ſtealing under a Neceſſity, where the taking is upon abſolute neceſſity indeed, and it's not the parties fault, but misfortune, he fell into ſuch neceſſity: And eſpecially if the Party whom the taking is from, have not the

the like neceſſity for the ſame thing, or the Perſon that takes be very Serviceable or Profitable to the Kingdom or Common good, &c. yet he muſt be, though the thing ſo taken be not of the value of 13 *d.* if the *Jury* agree he did it Feloniouſly; whereas one guilty of Perjury, though does one a hundred thouſand times more harm, ſhall only ſuffer an inconſiderable Rebuke. And why ſhould a *Jury* in this Caſe find it done Feloniouſly, this was done under Force and Neceſſity, to preſerve a Man's Life, &c. inſtead of an Houſe, &c. and what's ſaid Felonious, muſt be, *felleo animo*, with an ill affected Mind, with a Mind not barely to do the thing, but an itching alſo to do miſchief (only this itching indeed ſhall be preſumed, unleſs cauſe appear to the contrary.) As if one takes a thing out of anothers poſſeſſion, claim-

claiming it with ſome colour as his own, &c. this is adjudged no Felony. Why? for not done with any Felonious intent, as appears by his claiming, &c. So the like ſtealing, as aforeſaid, was not for miſchief-ſake at all, but for neceſſity, &c. Thus *David*, againſt the Law took and eat that Bread which was provided for the Table of God only, *Exod. c.* 29. 1 *Kings* 21. Our Saviour and his Apoſtles plucked off, and eat the ears of another's Corn, *Mat.* 12. And he, becauſe he had need of an Aſſe, took that was none of his but anothers; and had *Lazarus*, ready to periſh, taken *Dives*'s crumbs againſt his will, &c. yet it ſeems he had no more ſinned than he miſ-behaves himſelf, that does what the Lord bids, and the Steward forbids, under the Rules aforeſaid. A *Jury* therefore not obſerving the Rules aforeſaid, gives a Verdict

Verdict not only againſt the preſent and immediate Defendant, but alſo in him even againſt *David*, *Chriſt*, &c. repreſented thus in his Caſe. In the Civil Law (that of the Admiralty particularly) if a diſtreſſed Ship takes water by force of another where is plenty, it's no Theft; becauſe of the neceſſity, ſo adjudged ſeveral times. If an Indictment mention one Seditiouſly, and deſigning to diſturb the Government, and to withdraw from the King the love of his Subjects, ſaid of him ſuch and ſuch words, here the words might, perhaps, be ſpoken within the Priviledge of Diſcourſe in Parliament, or in a Jocular way, or Ironically, when one means the contrary; or by way of Suppoſition in Argument, or when one meant a contrary thing or no harm at all; and this perhaps too, explained at ſame time in other words,

words accordingly, or the words in the Indictment be but part of the Sentence, &c. or tranſpoſed, or ſome how elſe altered. So, if a Complaint be, that one falſely and maliciouſly, and withal deſigning to break his Credit, and ruine his Trade, called ſuch a one a Bankrupt; here, perhaps, he was a Bankrupt then, or no Trades-man at all; therefore in theſe and ſuch Caſes, the Circumſtances alledged being not implyed neceſſarily, though the Fact or words were ſpoke, they muſt be proved. But to inſtance ſome Caſes adjudged by the Judges themſelves: If *A.* bring an Appeal againſt *B.* and *B.* is after acquitted; now, ſhould *B.* Indict *A.* for maliciouſly, &c. bringing the Appeal, the Indictment ought not be found, if *B.* were before Indicted of the ſame fault he was after Appealed againſt for, becauſe his being Indicted before,

fore proves there was at leaſt colourable Reaſon why the Appeal was brought, and not Malice only, *Coron.* 178. 40 *E.* 3. 42. A Surgeon was Indicted, for that he by negligence in Curing one's Hand, maimed it; the negligence muſt be proved, 48 *E.* 3. 6. 11 *H.* 6. 18. So in Actions for words, which holds the ſame Law as in Indictments, &c. *A.* ſues *B.* for falſely and maliciouſly calling him, being an Heir, a Baſtard; Action will not lye, if *B.* pretend himſelf Heir, for then it was not maliciouſly, but only as it were in order to get or claim the Land, &c. And it's Lawful thus to ſlander another, juſtifying one's own Title, *Co.* 4. 10. So *Molton* ſues *Clapham*, for that a Suit depending between them, upon reading certain Affidavits in Court, *Clapham* openly then and there falſely and maliciouſly ſaid, there is not

not a word true in the Affidavits, and that he would prove it by 40 Witneſſes; here the words, though were agreed falſe, yet being not ſpoke maliciouſly, but out of other deſign, as in his defence, &c. as aforeſaid, Action does not lye, *B. R.* 14 *C.* 1. *Rot.* 459. So a Councellor calling one a Thief at a Tryal, the like; for it's not malicious, &c. if material for the Cauſe he manages, *Montagues c.* So where *A.* ſays to his Friend *B.* that *C.* hath the *French Pox*, therefore adviſing him not to keep him Company; for ſpoke as Advice to a Friend, and not maliciouſly, *James* and *Rudley's c.* 40, 41. *El. in B.* And thus is further ſeen the Cauſe and Occaſion of ſpeaking words, or doing any thing, muſt be conſidered as well as the words or Fact: And ſays *Coke*, *This* is a *General* Rule, *Co.* 4. 14. Alſo it's another Rule, All Offences in Fact

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'or

'or in a contrary ſence than they 'were, for *ſo* the Circumſtances al-'ledged import, *though be found* '*of courſe*. If a *Jury* find an In-dictment, &c. with the word *felo-nicè* in it, they find one Guilty of Felony, be the Fact what it will, and ſo as a Felon the Defendant muſt ſuffer: So alſo if the word *proditori-è*, for High Treaſon; and why may not they as juſtifiably find theſe words of courſe, as other not neceſſarily implyed? Where an In-dictment, &c. is grounded upon a Statute, then every little word muſt be proved that is alſo in the Statute, though ſeeming implyed, or little more than immaterial; this *all a-gree*. For want of theſe, and ſuch like Obſervations, one *Tho. Burdett*, Eſq; was Condemned, Hanged, and Beheaded at *Tyburn* in *Edward* the Fourth's Time, when the matter proved was only, that he being abſent,

abſent, the King Hunted in his Park, and killed a white Buck, which Mr. *Burdett* fancied above the reſt of his Deer, and that Mr. *Burdett* hearing of this, wiſhed the Bucks Horns in his belly that Adviſed the King ſo to do, *Speed*'s *Hiſt.* 700. Much like was it alſo with one *Walter Walker*, who was Beheaded in *Smithfield*, *Anno* 1476. when all proved againſt him, was only, that he (Living *at the Sign of the Crown* in *Cheapſide*, *London*) ſaid to his Child, to pacifie him when he cryed, *Peace*, *peace*, *Child*, *thou ſhalt be Heir of the Crown.* But who can open ſome *Jury-mens* Eyes to ſee how like an Ox led to the Slaughter they be impoſed upon, and cheated to cheat others of their Lives, Fortunes and all that's dear to them: though by their Example too of Acting thus they make Preſidents, and give countenance to

after Juries to be like themſelves, and conſequently expoſe and render themſelves, they know not how ſoon, in the ſame predicament, and to be Puniſhed as the Criminal was they Puniſhed. *Or by the Evidence given you.* 'Evidence is only ſuch 'Teſtimony that makes ſomewhat 'relating to the iſſue or matter in 'queſtion clear, manifeſt, and plain 'to the *Jury*; hence ſays *Coke Lit.* 283. *Probationes debent eſſe evidentes & perſpicuæ.* And thus is it, all the Witneſſes or Teſtimony in the World of things impoſſible, repugnant, inconſiſtent, &c. can be no more than *bare Teſtimony*, and cannot any wiſe amount to, or be called *Evidence.* Herein the *Jury* muſt conſider the Credit and Authority of the Evidence, and the matter or extent of what is Evidenced. *Firſt*, If the matter proved amount to ſuch plain and full

Proof

Proof as is required. An Indictment laid againſt three Perſons may not be found againſt all three, when the Evidence is only againſt one or two of them; nor if laid againſt one Perſon for three faults, may it be found againſt that one for all the three matters, when but one or two of them are proved; nor when the Evidence is but to part of a matter or fault, may the Indictment be found for the whole; but, as aforeſaid, all found muſt be proved. Indictments, &c. as aforeſaid, brought upon, or referred to *any Statute*, the words of the Statute mentioned in ſuch Indictment, &c. muſt be proved very ſtrictly, even to a tittle; the Proof muſt hit the Bird in the Eye. As one Indicted on the Statute for *maliciouſly diſturbing a Miniſter at Divine Service*, every one of theſe words muſt be proved; ſo for *wilfully and corruptly forſwearing*

one's ſelf; ſo *for one's gain keeping a Gaming-Houſe*. But in other Caſes, as *at Common Law*, if the proof and words in the Indictment, &c. differ either in the *matter*, or the *form*, or *manner* inconſiderably, or ſo as the difference be not ſomewhat conſiderable or material, as aforeſaid; ſuch is indeed no difference in Law, nor by the *Jury* to be taken as any. In the *matter*, as in a Complaint for theſe words, *B. is a maintainer of Thieves, and a ſtrong Thief himſelf*; here the word *ſtrong*, ſignifying little or nothing, need not be proved ſpoken, *Dy.* 21. 75. But if the Allegation and Proof materially differ, otherwiſe; as for theſe words, *If* B. *might have his will, he would kill all the true Subjects in* England, *and the King too*. Now, the Proof being that the defendant ſaid, *I think in my Conſcience that if B. &c.* the beſt Opinions

Opinions in this Caſe are, that this is not ſufficient Proof; for the words alledged are more poſitive and abſolute, and move Credit more in one's Ears than thoſe proved, and ſo are not in effect the ſame, but materially differ. So of theſe words, B. *procured eight or ten Witneſſes of his Neighbours to Perjure themſelves*, the Proof being only that the Defendant ſaid, B. *had cauſed eight or ten, &c.* This is no proof, for one may be a *Cauſe*, and yet not a Procurer, there being remote Cauſes, *cauſa ſine quâ non*, as well as others ſo nigh, as that of procuring. Such a Cauſe as this B. mght be, though only Plaintiff or Defendant in a Suit, for had there been no Suit, there could be no Perjury. And the moſt favourable and innocent ſence of words is to be taken, and no other. As for the *manner*, An Indictment being for Murder *by Poiſon*;

Poyſon; if the Proof be it was *not by Poyſon*, but a Weapon, Burning, Drowning, &c. this will not do; for the manner proved is of another nature proved than alledged; but if the difference were only thus, that the Poyſon alledged were of one ſort, and that proved of another, this being immaterial (both agreeing it was by Poyſon) the Proof may ſerve. So Murder alledged to have been committed *by a Dagger*, the proof being it was *by a Sword* or Bill, may ſerve; but proof *by Poyſoning* will not do. If an Aſſault and Battery be alledged to have been *at A.* the proof being it was *not at A.* but *B.* may ſerve, provided the Offence be neither greater or leſſer, whether committed at *A.* or *B.* But if the place alledged aggravate the fault, it's otherwiſe; or if both places be not in the ſame County. So of the like

difference

difference in time alledged and proved. *Now*, as to the Credit and Authority of what is Witneſſed: 'It's no proof or Evidence to a *Jury*, 'which is againſt their own know-'ledge; nor any other but that on-'ly which confirms them in what 'did know, or acquaints them with 'what did not know. The only Reaſon, ſaid my *Lord High Steward* at Lord *Cornwallis*'s Tryal, why a Priſoner is allowed no Councel in matter of *Fact*, or in any thing but matter in *Law*, when *Life or Member* is concerned, is only this, *The Evidence whereby he ſhall be Condemned, ought to be ſo plain and evident, that all the Council in the World may be preſumed able to ſay nothing againſt it, or in his Defence.* Nothing ought ſo much as raiſe a ſuſpicion, ſays *Horne*, but what comes from *grave and good People*, thoſe which be *Credible*, and heed what

what they ſay, *Mir* 200. And not from others, as ill-tongued, ill-diſpoſed, &c. People, *Bract. Brit. Stanf.* 'The great Lord *Coke* ſays, of old 'time (as yet, ſays he, indeed it 'ought to be) Any Indictment was 'not to be found but on Credible 'Witneſſes, and plain and direct 'proof; and never upon Probabili-'ties or Inferences, &c. *Inſt.* 2. 384. The Famous *Montagne*, *p.* 1040. ſays, *à tuer les gens il faut un clartè bien lumineuſe & nette.* And the Lord *Coke*, *Inſt.* 3. 25. It's *moſt neceſſary*, as many hold, there ſhould be *two* good Witneſſes produced to the *Grand Jury* to prove every Indictment. And the Proof, ſays *he*, ought to be *more* clear than *Light*. Every *Jury* muſt always remember they may preſume nothing but *Innocency*; and *Innocency*, *&c. they ought*, until the contrary proved. Of preſumption and Argumentative Verdicts,

dicts, &c. finding one Guilty, there be ſeveral very ſad Examples. One the Lord *Coke* tells of, is, *There being two Brothers, one dies, leaving an Eſtate and an only Child, the other Educates it, and one Night Correcting it, it cryed, Good Unkle, do not kill me, and next Morning it was gone no body knew whither. This Brother is Accuſed of its Death upon Evidence of the matter aforeſaid, that he beat it, it was Young, about Nine years old, it cryed, as aforeſaid, it was never heard of ſince, and that the Unkle enjoys an Eſtate by this. The Jury find him Guilty, and he was Hanged, but about a year after it returned ſafe and well,* Inſt. 3. 232. The Scripture enjoyns the uſe always of *two* Witneſſes at leaſt when yet the Puniſhment *then, and there* was ſo much leſs than *now with us*, for the Crimes to be puniſhed, *Deut.* 17. 6. 16. 19. 15. *Mat.* 18. 16,

Jo. 18. 27. 2 *Cor.* 13. 1. *Heb.* 10. 28. *Vox unius nullius vox.* One is none, *l.* 8. *C. de teſtibus. Quædam ſunt cauſæ quæ plures quàm duos exigunt teſtes, nulla tamen quæ unius teſtimonio terminetur*, ſays the Civil Law. In ſome Caſes there muſt be more than two Witneſſes, but never fewer, *c. Licit* 23. *in fin. extr. de teſt.* By the Ancient Laws of *England*, no Indictment was to be received againſt a *Presbyter* without three, or at leaſt two Witneſſes; againſt a *Cardinal Deacon* without twenty ſix, or at leaſt twenty four; againſt a *Cardinal Presbyter* but with ſixty four, or at leaſt fourty four; nor againſt a *Cardinal Biſhop* without ſeventy two Witneſſes, *Lamb.* 178. The general Rule is, *In ore duûm vel trium ſtet omne verbum ſi modo ſint omni exceptione majores.* Two or three Witneſſes be enough, if lyable to no Exception:

Any

Any *one* Perſon may invent or contrive any Story for Malice or envy, or other End, to take away anothers Life, &c. And who can diſprove or detect him? But it's not ſo eaſie for *two* to do it; yet *two* may poſſibly alſo agree and contrive an Evidence together, and ſo form it, and frame Circumſtances all agreed of before-hand between them, that being falſe, it may yet ſeem very plauſible; *The Children of this World be wiſer than the Children of Light.* *Jezebel* had *two* Witneſſes againſt *Naboth*; and two Witneſſes were againſt Chaſte *Suſanna*, to prove her Avoutry, yet both had falſe Evidence againſt them. *Suſanna* was acquitted, only becauſe the Witneſſes differed what Tree it was under. In all Tryals whatſoever in *England*, either at Civil Law, or Common Law, where is no *Jury*, there all will confeſs, muſt be

be *two* Witneſſes at leaſt, *Co. L.* 6. b And always that Witneſſes are to be joyned to the *Jury*, they muſt be *two* at leaſt, *ibid.* And in any Law any where muſt be always *two* Witneſſes at leaſt, and no place can be pretended of otherwiſe, except *only England.* And that it ſhould be ſo *here*, even when there is a *Jury* too, ſee 48 *Aſſ.* 5. *Barree* 241. *Enqueſt.* 42. *Bract. l.* 5. 400. 48 *E.* 3. 30. And ſo is expreſly *Mir. c.* 3. &c. *Forteſc.* 73. *Co. L.* 6. b *Inſt.* 3. 26. And ſo it was agreed in *B. C. Trin.* 9. *El.* And the only Reaſon why it ſhould be otherwiſe, is as aforeſaid, that the *Jury* be preſumed to know themſelves, to the value of one Witneſs more. But if it ſo fall out, that really they know nothing themſelves; then, ſhould they find one Guilty upon a ſingle Teſtimony, they make that Law, which otherwiſe could not be Law, and find one Guilty

Guilty the Law would have acquitted; and thus a Tryal by a *Jury* would be leſs ſafe, and more deſtructive than any other in all the whole World again. The *Jury* thus make *one* Witneſs as good as a *thouſand*; for had a thouſand Witneſſed, the *Jury* could have done no more. This would occaſion great Miſchiefs, Perjuries, and other Inconveniences. *A.* then being ſufficiently Malicious or Intereſted, and ſo deſigning *B*'s Death; an *Italian* would *Poyſon*, *Spaniard Stab*, *Frenchman Piſtol* him; but being an *Engliſh-man*, and expecting ſuch a Credulous, Officious *Jury*, as aforeſaid, to help him, will ſure chuſe to *ſwear* him to Death; for *A.* has his Malice better anſwer'd. *B.* thus not only loſes his Life, but alſo his Credit, Eſtate, and what not? Beſides attainting his Blood, and utterly diſgracing all his Relations; and

and at laſt, how ſhall *A.* be diſcovered in it? He is infinitely more ſafe this way than any other. Or ſuppoſe one comes out of the Moon, and by chance ſhould diſcover him, he knows he is ſafe of his Life, he ſhall not dye by our Law: If any body happen too that will be at the Trouble, Charges, Hazard, and Danger to Proſecute him never ſo ſeverely. But by the Statute he ſhall forfeit 40 *l.* or at his Election ſtand a while on the Pillory, and half a year be in Priſon; this is all. Likewiſe a cunning Rogue, ſuppoſe Robs one, &c. no Witneſs by; if one offer to Proſecute him, let him Proſecute firſt, and he Hangs one *thus* into the bargain, and ſaves himſelf honourably. Or were there one or two Witneſſes by, but he firſt Proſecutes, and Swears againſt all; it will go hard with them all.

It's ſaid of the *Egyptians* they had no puniſhment for lying, and ſo had no meaſure in it; But thus *our* Law *tempts* as well as *ſcarce at all puniſhes Perjury.* A Jury though have two or more Witneſſes ought alſo conſider and examine their circumſtances. Amongſt the *Turks* only ſuch may be Witneſſes as are Freemen, can ſay their prayers, have ſome knowledge in Law, be known of civil life and converſation, &c. *Boſchiner Academ.* 19. By the Laws of *Scotland* (for the moſt part always like ours) none ſhall be Witneſs under 14 years old; furious people, officer of the ſame Court, Women, Adultrous perſons, Thieves, poor, whipt for any offence, infamous, convict and ranſomed from juſtice, kinsfolks, Companions or parties of the ſame crime, Clergie againſt Laity; nor any ones Tenant, Bailiff, ſervant or any other of his Robe,

Robe, Councel, Retinue, &c. nor any known adverſary, nor any perſon Excommunicate or Impriſoned for, or accuſed of a Crime. *St.* 2. *Rob.* 1. By *our* Laws none ought to be a Witneſs that's Indicted of Treaſon or Felony and not acquitted, perſons excommunicate, outlawed or otherwiſe defamed, nor Judges in any caſe where they ſhall be concerned as Judges, *Brit.* 39. *Mir.* 117. 108. *Bract.* 118, 119, 133, 141. Perſons outlawed or otherwiſe infamous, 11 *H.* 7. 41. *Young* 116. *Stanf.* 88. 11 *H.* 4. 35. *Inſt.* 3. 26. And certainly they can't that be infamous as attainted of a falſe Verdict, of any Conſpiracy at Kings ſuit, of Perjury, of a Præmunire, of Forgery on the *Stat.* 5 *El. c.* 14. of Felony, or have by judgment loſt their ears or ſtood on the Pillory, or be Infidels, or *non ſanæ memoriæ*, of inſufficient diſcretion, conſiderably inter-

intereſted in the matter, *Crompt.* 127.[b] *Co. L.* 6.[b] A Husband or Wife can't be Witneſs for or againſt one another, *Co. L.* 6[b] nor againſt any other in the ſame cauſe, *Stanf.* 26.[b] Execpt in criminal caſes where he or ſhe is the party offended, and ſwears only for the King and no other Evidence can be expected. The confeſſion of a Criminal gotten by fright or any artifice uſed upon him, or made before comes to his Tryal is no Evidence againſt him. The Common Law was ſo ſtrong in this point that 'till 2, 3, *P. & M. c.* 10. no Juſtice of Peace could examine a Criminal; in ſhort,

Conditio, ſexus, ætas, diſcretio, fama,
Et fortuna, fides in teſtibus ipſe
requires.

Ask his Eſtate, Fame and Religion,
Quality, Sex, Age and Diſcretion.

But

But the *Judges* uſe to Determine *who* ſhall be ſworn, and *what* ſhall be produced *as Evidence* to the Jury, and the *Jury* what *credit or authority* the ſame's worthy of, *Co. L.* 6. One that's burnt in the hand for Felony is by ſome held to be a Witneſs in Law; for, the Crime ſay they, is purged ſo if pardoned by the King. And ſome hold many of thoſe aforeſaid are in Law good Witneſſes, as *Poor* men; but the Jury may conſider ſuch may eaſier be byaſſed or corrupted, he has not ſo much to loſe or forfeit for a Crime, he lies under ſeveral neceſſities and temptations a Rich man does not, &c. In *Solomons* (Proverbs) *c.* 30. praying againſt poverty the reaſons alledged *leſt being poor, one ſhould ſteal and take the Name of the Lord in vain.* And its for ſomething the Poet ſays,

Quantum

Quantum quiſq; ſuâ nummorum ſervat in arcâ,
Tantum habet & Fidei———
Juvenal.

As for *ſervants, &c.* they are under the ſame circumſtances commonly of *Poor men* and worſe, for more apt to do any thing in obedience, or favour, or elſe out of Malice, &c. againſt or for their Lord, &c. Before the Conqueſt the Oath of a *Thane* (one of like degree then as a Yeoman is now) was in Law Equivalent to the Oath of *6 Villains, Pagans, &c.* (ſervants that were bound) *Lamb.* 56. 200. as for Perſons any wiſe *Infamous*, ſuch will not value or ſtand upon their Credit, or but the leſs, ſince have little or none to loſe, *and over ſhoes over boots.* As for criminal Perſons, It's a maxime, *Juſtitia non poteſt cum ſcelerato commercium habere.* He that

that has been once wicked, or in one thing, may be ſuſpected again, or in another thing, hence where a Defendant is ſuppoſed in Law guilty but of a contempt, Treſpaſs, deceit or injury: He ſhall not wage his Law, for the Law will not believe *him*, though would believe another againſt *whom* is an action of Debt, Detinue or Account, *Co. L.* 295. As for one under 14 Years old, ſuch are, as our Law ſays, not arrived at Diſcretion, ſuch may miſtake, be Influenced, &c. and ſo of all the reſt. But it were not amiſs if Juries heard all perſons weighing their Teſtimony as ought. A Jury ſhould miſlike any Witneſs alſo that in's Evidence varies, delivers himſelf in any paſſion, ſpeaks at random or not cautiouſly, or ſeems to ſide with or againſt either party, or to argue, or to offer proving Negatives. None can ſwear a Negative, nor may

may be admitted to give Teſtimony directly againſt an Affirmative, 48 *E.* 3. 30. 12 *H.* 6. 6. *Aſſiſe* 408. 12 *H.* 4. 9. 50. *E.* 3. 16. 43. *E.* 3. 32. *Fleta li.* 6. *c.* 6. *FNB.* 136. *h.* 97. *c.* A Jury may take notice of particular Statutes, Patents, Judgments, and other Records given in Evidence and may go againſt Eſtopels, Concluſions, &c. ſo it be according to the very truth; for they muſt ſpeak the truth, in all Caſes, *Co.* 4. 53. It's much the Jury does not always examine Witneſſes *themſelves.* If he that examins them be corrupted or any wiſe ill affected, He may eaſily miſlead the whole courſe of Evidence, He may countenance which ſide he will pleaſedly, hearing the one ſide or one ſort, but the other not without brow-beating and uneaſineſs, He may frighten, diſcountenance, divert, puzzle, diſtract or otherwiſe abuſe a Wit-

Witneſs, He may Flatter, wheadle, prompt, ask leading queſtions, direct, &c. and thus darken and perplex the truth.

How does a Jury diſcharge his Conſcience thus? The Jury is the only Judges alſo of what is ſaid, and how the Verdict ſhall be given, and they whoſe Conſciences are to be ſatisfied, and certainly know beſt what they want to know, &c. unleſs walk by implicite faith, and therefore be the moſt proper to ask the Queſtions.

All that is aforeſaid ſhould alſo the rather be as propoſed, conſidering how the Law is now alter'd as to Accuſers, Judges, Witneſſes, Councellors, Solicitors, &c. Anciently *Omnis qui crimen objicit ſcribat ſe probaturum. Et non oportet quenquam Judicari vel damnari priuſquam legitimos accuſatores habeat preſentes*, Ll. Guil. 1. *c.* 5. All Perſons

ſons that Indicted any other were to be ſufficient, reſponſible, &c. *Co.* 5. 120. Accuſers gave ſecurity to anſwer damages if the Accuſation proved falſe. *Mir.* 19, 120, 124, 147, 195. *Glanv.* 75. *longam carceris inducunt incluſionem cum redemptione, falſæ appellationes & hujuſmodi abettatores*, *Fleta* 142. Fines were ſet on Appellours, 11 *R.* 2. Fines 2. 15 *E.* 3. Fines 49. 107. If *A.* brought an Appeal in any Caſe and was either barred, nonſuited, or his Writ abated, He was fined and impriſoned *immediately without Defendants trouble.* 8 *H.* 4. 17. 20. *Brit.* 245. 32. *Aſſ* 9. 42. *E.* 3. 26. *Appellee* acquitt, the *Apellour* was by the ſame judgment without more trouble impriſon'd a Year and day, and was to repair the damages of Credit, trouble, charges, &c. of *Appellee*, beſides, undergo a grievous Ranſom or Fine to the King; and ſo was it of

of Abettors or encouragers of the proſecution, *Fleta* 53. It was death to Appeal innocent perſons of any mortal Crime, till *H.* 1. brought it to Corporal puniſhment and ſatisfying the party grieved his damages, *Mir.* 250, 251. So the Lawyers were puniſhed for aſſiſting the Accuſer, and a year and a day's Impriſonment inflicted on a Sergeant, Lawyer, Attorney, or Clerk, to uſe Deceit or Colluſion in a Court, or conſent to it either in favour of the Court, or any Perſon elſe, *Fleta*, 37. Councellors were to be ſuſpended Practiſe, if tendered falſe delays, falſe Witneſſes knowingly, uſed Deceits, Fictions, or Untruths to the Court. And were to Swear not to maintain or defend any wrong or falſity, *Mir.* 121, 122. And it's by a kind conſtruction they be not yet lyable in ſeveral Caſes to be puniſhed, as Barrettors, Maintainers,

tainers, &c. An Aſſize did lye againſt Councellors, Attorneys, &c. by whoſe ill practiſe or means any one loſt but a Free-hold in Land, *Mir.* 154. 209. *Brit.* 315. So Witneſſes have formerly been puniſhed ſeverely. In the Scripture, the Story of *Suſanna*, the Witneſſes are put to Death. By *Moſes*'s Law it was Eye for Eye, and Tooth for Tooth, Life for Life, &c. againſt falſe Witneſſes, *Deut.* 19. 21. By the Law *Cornelia* amongſt the *Romans*, a Witneſs that occaſioned another's Death by falſe Teſtimony, loſt his Head, if one of the greater Quality, elſe he was Hanged on the Croſs, or given to Wild Beaſts, *Simler.* Before the Conqueſt, that of *Moſes* was moſtly; ſo with *us*, only ſometimes it was Baniſhment, &c. *Ll. Ed. c.* 3. *Ethelſt. c.* 10. 25. *Edm. c.* 6. 35. &c. *Edw. & Gru. c.* 11. *Auſſi ſont homicides devolunt juges*

& teſmonis que fauſſes, *Mir.* 34, 36. Falſe Judges, and falſe Witneſſes are guilty of wilfully killing Men. After it came to cutting out of Tongues, *Mir. c.* 4. *Ll. Canut. c.* 15. As for Judges, they were accounted Diſſeiſſours, if wronged any one in his Title, *Brit.* 137. *Mir.* 154, 209. *Brit.* 315. In *Scotland*, *Judex qui ter malè judicaſſe convictus fuerit perdit Officium & ſit infamis*, *Stat. Rob.* 1. *c.* 28. A Judge convicted of thrice having ill Judged, loſes his Office, and is adjudged infamous. Says *Glanvil*, *Tenetur Curia Judicium ſuum tueri per duellum & maximè per illum qui Judicium reddidit. Et quidem ſi Curia de falſo Judicio convicta fuerit, Dominus Curiæ in miſericordiâ Regis manet & perpetuò Curiam amittit; præterea tota Curia in miſericordia Regis remanet*, Glanv. 66. *Altreſi qui faus jugement fuit pert ſa Were ſi il ne*

pret

pret prover ſor ſaintz que melz ne poet juger, *Lamb.* 162, 64. Alſo whoſoever gives a falſe Judgment, ſhall forfeit his *Were* (what's Life is worth) unleſs can prove on Oath he could Judge no better. Judges, if Condemned one to Death againſt their knowledge, or by Ignorance of, or in what they ought not, as Judges, be Ignorant of, they be Murderers, &c. and to dye as ſuch, *Mir.* 256. *v. Bract.* 412. King *Alfred*'s Law was, That falſe Judges, becauſe diſhonour *God*, whoſe Vicars they be (the Scripture calls them Gods) and the *King*, which raiſes them to ſuch an Honourable Seat as the Chair of God; they ſhall (firſt) make ſatisfaction to the Party grieved, forfeit what elſe they have, and ſuffer further Puniſhment at Kings will and pleaſure. And if they falſely put to Death any, then to dye themſelves, and

always at leaſt to ſuffer like for like, *Mir.* 265. 301. Appeal of one's Death lay againſt a Judge for Judging one falſely or wrongfully to Death, *Mir.* 136, 258, 298. Preſentments were made againſt Chancellours, Judges, &c. for breaking their Oath, *Mir.* 144. There were 44 Judges hanged in one Year for wrongful Judgments, *Mir.* 296. &c. And ſays the ſame Book, it's an abuſe, that all things are not ſo now, 296. What became of *Treſilian* and *Belknap*, of later years? But now the Law ſeems clear otherwiſe, we have little or no puniſhment againſt Chancellours, Judges, Councellors, Attorneys, Clerks, Witneſſes, &c. yet were Juries *then* ſo cautious, as aforeſaid, with and againſt them, where *now* therefore how many times more Jealous and cautious have they reaſon, and ſhould they be?

The

The Law conſidering the great burden that lies upon the Conſciences of Jury-men, has favoured them with this Liberty. They may, as aforeſaid, take upon them the knowledge of what the *Law* is in the matter, or upon the truth of the Fact, as well as the knowledge of the *Fact*, and ſo give in a Verdict generally *that the Defendant is Guilty or not.* Or they may give in *only* the matter of *Fact*, particularly how they find it to be, and then leave it to the Judges to determine. Or they may acquaint the Judges how the matter of *Fact* ſtands, and then ask the Judges their Opinion, as to the matter of *Law*, and then determine the whole matter *themſelves.* The *Grand Jury* ſtrikes out of the Indictment what they be not certain is true; or may any wiſe alter it to what they be certain is true: Or if any thing be

in it they be *doubtful of*, they may ſuperſcribe it *Ignoramus*, at their Election, in all theſe Caſes. Thus if a *Jury* find the words not ſpoke, or the Fact not done, with, and according to the Aggravations & Circumſtances in an Indictment, &c. mentioned: They ought either *not find* the Indictment (for one not being Guilty as the Indictment mentions, is conſequently not Guilty of that Indictment, but rather ſeems, if Guilty at all, Guilty of ſome other matter than which he ſtands Indicted of, and ſo of ſome other Indictment only; and then let the Proſecutor, if ſo fond of troubling his Neighbours, bring ſuch other:) Or *ſtrike out* what they have not ſufficient Evidence of, as do often in Indictments of Murder (which ſay the Defendant *of his malice fore-thought Feloniouſly Killed and Murdered* ſuch a one) ſtrike out the words *of his malice*

lice fore-thought, and *Murdered*, having no Evidence of the Malice, but ſufficient of the reſt, and then Endorſe it *Billa vera*, and ſo find the Bill *Man-ſlaughter*, inſtead of *Murder*. So was it of an Indictment againſt Lord *Chandois* and Count *Arundel* his Second in a Duel. In like manner when the Evidence proves a Fact done only by miſchance, defending ones ſelf, in time and place of War, when Defendant was *non Compos mentis*, an Officer doing his Office, &c. the *Grand Jury* alter the Indictment accordingly. So of the *Petit-Jury*, only it does not alter the Indictment, &c. but inſtead of altering Murder to Man-ſlaughter, &c. as aforeſaid, in the Indictment, they only ſay, Guilty of Man-ſlaughter, and not of Murder; or Guilty of Chance-medley, *Se Defendendo*, &c. Or they may tell the Court particularly and

plainly how they find the Truth in and of the whole matter to be ſo far as concerns the Fact, or what was done or ſaid. As in Caſes of words, what were ſpoke, where, to what intent, &c. and ſo leave it to the Court to Judge upon it according to Law, and to tell what the Law is thereupon, and ſo be diſcharged themſelves, which is called giving a *ſpecial* Verdict. Suppoſe *A.* bring an Action of Debt on a Bond againſt *B.* as Heir of *C.* and *B.* pleads he hath nothing from *C.* to pay any thing with; and *A.* replies, that he has, &c. and ſo the Iſſue is joyned (or what the *Jury* be to Try, is) whether *B.* has any thing, as aforeſaid, or not. *A.* proves that *B.* had before the Action, brought ſomething ſo, but aliened it by fraud and ill Practiſe, to deceive *A.* of his Debt. Now, they finding the matter or caſe to be thus indeed, and the

Law

Law being (for there is a Statute, 13 *El.*) that ſuch aliening ſhall be void, and conſequently, the Heir chargeable nevertheleſs: They may, if will, as aforeſaid, either take upon them to know the *Law*, and in this, or any Caſe, ſay *generally*, they find for *A.* Or not take notice of the Law, but *only* of the *Matter*, and ſo tell the Court how, and what they find the matter to be; and thus leave it to the Court to Judge in *Law*, whether ought to be found for, and this is their moſt ſafe way. To this end was the *Stat. of Weſt.* 2. *c.* 3. that if a *Jury* doubt on the Evidence what the Law is, and therefore what to do, they might leave it to the Judges to determine. But, ſays *Coke*, this Statute is only in *affirmance of the Common Law*, *Inſt.* 2. 425. 13 *E.* 1. 39. See a *ſpecial* Verdict in Caſe of *Murder*, *Co.* 4. 44. *Co.* 9. 63. One

in an *Information*, *N.B. Entr.* 375, 378. *Co.* 1. 22. One in *Attaint*, *Dy.* 173. So in a Caſe about *Murder*, the *Jury* tell the Court, they find the Killing it ſelf to be true, but not the Killing Felonioufly, as mentioned in the Indictment, and ſo ask the Opinion of the Court if it be Murder, *Co.* 9. 69. So the *Jury* found the Parties Indicted for *Riotouſly* tearing the Petition, Guilty of tearing the Petition, but not of the *Riot*, &c. It's true, it's doubted in *Moor*, *c.* 1002. whether in a Writ of Right a *Jury* may give a ſpecial Verdict. But *as* there is no Reaſon, that if the Cauſe be indifferently plain, as to the Law, the *Jury* themſelves ſhould not put an end to it, giving a *General* Verdict, as Guilty, or not Guilty, &c. without ſo much further Charge, loſs of Time, and increaſe of Trouble, as otherwiſe muſt needs follow; *yet* on the other

hand,

hand, there is as little why, if there be difficulty in Law upon the Caſe, that they being moſtly unlearned in Law, ſhould be bound to find *generally* Guilty or not, &c. and ſo find and ſay on a ſudden what is the very Law, as well as Fact, when ſome ſuch Caſes have ſeveral years puzled all the Judges to Reſolve. And it's againſt all Reaſon, that the *Election* of giving a ſpecial Verdict, or general Verdict ſhould be in the Judges too; for the *Jury* beſt knowing themſelves, their own Capacities and ſtrength, do therefore beſt know when meet with difficulties to them in Law, and ſo when to give the one or other: And accordingly are the beſt Opinions that the *Jury* may *chuſe*, be the Action, &c. real, perſonal, or mixt, Civil, Criminal, Publique, or Private; and be the Iſſue general or ſpecial, or in any Caſe whatſoever:

And

And that the Judges muſt accept of, and can't refuſe ſuch Verdict, 13 *E.* 1. 30. *Fitz. J. of P.* 114. *Co.* 9. 14. *Inſt.* 2. 425. *Inſt.* 4. *Co. L.* 227, 228.

Either *Jury* may any time alter their Opinion or Verdict, &c. before Recorded in Court, *Fitz. J. of P.* 114. *Co. L.* 227.

All ſaid any where above of *Grand Juries*, may be applyed to the *other* Juries; and no body will offer to deny but *other* Juries ought to be as ſtrict, circumſpect, and careful, &c. as aforeſaid, though would pretend otherwiſe of *Grand Juries*.

A *Petty Jury* may abridge a fault a *Grand Jury* finds one Guilty of, but can't enlarge it: As one Indicted of *Murder*, may by the *Petit Jury* be found Guilty of *Man-ſlaughter*, *Chance-medley*, &c. inſtead thereof; but one being Indicted of *Man-ſlaughter*, can't by the *Petit Jury* be found

found Guilty of *Murder*, or any *greater* Crime than *Man-ſlaughter.*

A *Petit Jury* can't give any Verdict againſt any one, where Life or Member is in queſtion or danger, but only in the Court, whilſt alſo it's ſitting, &c. though in other Caſes may.

A Letter

A

LETTER

TO THE

Author.

SIR,

HAving by your Friend received your Treatiſe concerning *Juries*, with deſire that I ſhould ſhew it to one whoſe courſe of Study is ſo well known to be Converſant with Ancient Records and Books, as his Judg-

Judgment is worthily Esteemed, I did, after I had Read it over, perform that Trust, by shewing it to that Learned Gentleman, whose Opinion, your Friend told me, was desired; and further, by that Gentleman, it was Communicated to another Worthy Person of the same Course of Study; and both of them having Read it over, I from them return it to you, with assurance, that they, as well as I, have had much Satisfaction and Delight by seeing so useful Subject Matter so Learnedly Treated of, in a time, when the Publishing it seems *not only Seasonable, but Necessary.*

I wish we might have the Happiness to know you, but being assured, by your Friend, that you have taken a Resolution, as yet, to Conceal your Name, we must for the present, think it enough to believe that Treatise is Composed by a *Worthy*, as we find it could be done by

by no other than a *Learned Man.*

And I muſt, in returning your *Manuſcript*, preſent you ſome Matters and Caſes which occurred to our Thoughts in Reading it; which being agreeable with yours on that Subject, yet ſome of thoſe Caſes and Inſtances, I am about to mention, not being ſo particularly Expreſs'd in your Book, though two or three Paſſages which are in yours [as concerning all the Twelve of a *Jury* of Tryal to Conſent in Verdict; and in *Grand Juries*, Twelve at the leaſt to Conſent in making Preſentments, or Indictments; and the Matters of *Empſon* and *Dudly*] I ſhall herein repeat, becauſe they will relate to the other Paragraphs here intended; what may ſeem not mentioned in yours, are offer'd to you to conſider, whether you will Inſert them in ſome proper places among the Leaves

and

and Parts of your Book, and reject the reſt that I ſhall Write in theſe Papers, unleſs you pleaſe to receive them all together as they will be ſent to you, by way of Letter, which yet muſt want the Ceremonial Form of Addreſs, whil'ſt you forbear to let me know to whom to direct my Reſpects.

What I am about to preſent to you, relating to this Matter, are;

Let any Sober Citizen conſider, how Legal, Juſt, and Reaſonable, he would think it, if being of clear Reputation, Credit, and Innocency, he ſhould be Indicted for ſome Baſe, yet Capital Crime, upon the Oath of a *ſtrange* or *bad Fellow's* Evidence, who ſhould be altogether unknown to the *Grand Jury*, or vehemently ſuſpected to be a *Raſcal*, notwithſtanding which they ſhould (by the Judges Directions) find the Bill, and thereupon the Citizen

ſhould

ſhould be publickly Arreſted by Officers, haled from his Houſe or Shop, Committed to Priſon, his Goods Inventoried, and Gards ſet upon his Houſe to prevent pretended Imbezelments, and his Credit and Reputation utterly ruin'd, without Remedy. And after all this, that it ſhould be ſaid, the *Grand Jury* did well to find the Bill from whence all theſe ſad and woful Conſequences follow'd, *upon ſuch late applauded Notions, that the* Grand Jury *are not to be Judges of the Credibility of the Evidence; or that the Citizen is not in danger of his Life, till his Tryal by another* Jury.

Again; How much would ſuch Principles have been abhorred, and declaimed againſt, if a Woman, notorious for being a Common Whore, ſhould have Indicted the late Archbiſhop of *Canterbury*, for a Rape, and the *Grand Jury* ſhould have found

found the Bill, whereupon the Archbiſhop was to be Committed to Priſon, Suſpended from Eccleſiaſtical Juriſdiction, his Goods and Chattels all over *England* Inventoried by the Sheriffs? Would the Plea have Excuſed the *Grand Jury*, in the opinion of any Unbiaſſed and Impartial Man, that though they believed in their Conſcience, that the leud Woman Swore falſe, yet, they being to find according to her poſitive Evidence, they, as ſo many Pariſh Clarks were but to ſay *Amen* to her Oath of the Fact; and ſo find *Billa vera* againſt that Eminent Prelate?

It may be alſo conſidered, whether the Statute 13 *Car.* 2. *cap.* 1. which requires that perſons ſhall be Indicted and Accuſed by the Teſtimony and Depoſitions of *Two Lawful and Credible Witneſſes upon Oath can be Interpreted to make the Teſti-*

Teſtimony of Two Witneſſes not Credible, Sufficient Evidence? If the Witneſſes are to be Credible, as the Statute plainly declares they ought to be; then it may be further ask'd, Who are to be Judges thereof? If the Judges? Then they take upon them to Determin *Matter of Fact*, and ſo become Judges both of Law and Fact: And what need then is there of *Grand Juries?* But that the Credibility of the Lives, as well as the Circumſtances of the Evidence of the Witneſſes is Intirely left to the *Grand Jury*, is plain from this; That if one of the Judges be produced as a Witneſs, he muſt in that reſpect, for that time, leave his place as a Judge, and be Sworn, and appear before the *Grand Jury*, as any other ordinary Witneſs.

Beſides, If the intire Judgment of the Evidence had not by the Law been left to the *Jury*, then they would

would be finable, if they ſhould refuſe to find according to the direct Swearing of the Witneſſes, (whether true or falſe, probable or improbable to them,) and if they ſhould not implicitly follow the Pleaſure and Direction of the Judges.

But that the Jury *is not finable, is adjudged in the Caſe, you remember of* Buſhell, *in the Lord* Vaughan's *Reports, by Solemn and Seaſonable Reſolution of the Judges.*

And ſhould not the *Grand Jury* be Judges of the Credibility of the Evidence before them, the *Affidavits* of Two Perſons who ſhould Swear Treaſonable Words againſt any Man would be ſufficient to bring him immediately upon the *Jury of Life and Death*, and then the trouble of a *Grand Jury* would ſeem only a piece of needleſs Formality, which our wiſe Anceſtors never

never thought ſo ſlightly of before; and certainly the Uſe of them would never have been continued, nor would Men of ſo Great Worth, as they generally are, or ſhould be, Serve therein; where Sheriffs make a Conſcience of their Duty to Return ſuch.

It may not ſeem Impertinent here, to mention a Memorial, or Credible Report, of what happened in the Reign of Queen *Elizabeth*, concerning a *Jury*, at a Tryal, whereof the ſubſtance is; That a Murder being committed, a Man, who was ſuſpected for the Fact, was Arraigned before the Lord Chief Juſtice *Anderſon*, at the Aſſizes; the Evidence was ſo ſtrong that the Judge directed the *Jury* to find the Priſoner Guilty; and they going together to Conſult of their Verdict, Eleven were for finding him Guilty, but the

the twelfth Man was againſt it: This begat great Diſpute; and the Judge expecting a preſent Verdict, ſent for them to know the Reaſon why they ſtaid ſo long, he being ready to riſe; the Jury told him, they were all agreed but one, whereupon the Judge askt him, why he did not agree with his fellows to find the Priſoner Guilty, ſeeing there was ſo plain and full Evidence? To this the twelfth Man gave no Anſwer (*where by the way may be noted, that none of the Jury are bound to declare their Reaſon for their Opinion.*) So the Jury was ſent out again; but no perſwaſions could prevail with the twelfth Man to agree with the reſt: Therefore the Jury were ſhut up all Night without Meat or Drink, and in the Morning great were the Complaints from the eleven, of the indiſpoſition of their Health; ſo that the Judges

in

in Commiſeration ſent for them, and they agreeing with the twelfth Man, the Priſoner was found Not Guilty, and ſo acquitted. After the Jury had given in their Verdict, the Chief Juſtice deſired to ſpeak with the twelfth Man, and that he ſhould come to his Lodgings after the Court ſhould riſe: When he came, his Lordſhip taking him aſide, told him, that the Countrey look'd on him as an Honeſt Man, but in what he had done, he much doubted there was ſomething extraordinary, and deſired him to tell him what it was: The Juror, with a diſturbed Mind, told him, that if it might not turn to his prejudice, he would diſcover the whole buſineſs: To which the Chief Juſtice Replyed, that it ſhould not, and gave him his hand upon it; whereupon the Juror with tears told him that he was the Perſon that had un-

fortunately killed the Man, and that the Priſoner was not Guilty of it; and that this Juror had not ſought to ſerve in the Jury; and confeſſed, that after he was Sworn, *upon his Lordſhips Directions, and the Juries Importunities, he had once reſolved to comply, and find the Priſoner Guilty*; but when he conſidered, that was to add Perjury and another Murder unto Murder, he Reſolved to be ſtarved to Death, rather than to agree thereunto. When the Chief Juſtice had heard him out, you have, ſaith he, done a very ill thing; but ſeeing you have not added one crying ſin to another, Pray God for Pardon, and I will get you the Queens Pardon.

Sir, you having mentioned in your Book, I might omit to ſay any thing, that Juries of Tryal every one of the twelve muſt agree, or no Verdict can be given, and

and no way ſhould be introduced to go to the Vote, and Poll amongſt themſelves for the major part. But I could not forbear mentioning it again, becauſe ſpecial notice ſhould be taken thereof.

And alſo of what you have very well obſerved, that Grand Juries ought not *to find any Bill, or make any Preſentment or Indictment, unleſs twelve of their number agree to the Preſentment or Indictment.* The Rule of Law being very clear in this point, as may appear by the Statutes that direct Enquiry to be by the Oath of twelve Men: And all the ſaid Statutes prove, and ſome of them expreſly declare, that Enquiry by the Oath of twelve Men hath always been the laudable Cuſtom and Uſage of this Realm: Therefore though Grand Juries conſiſt of a greater number, and may put matters that come before them

to the Vote and Poll, yet the major part of them ought to be twelve at the leaſt to agree to any Bill of Preſentment or Indictment; for there cannot Lawfully be any Preſentment or Indictment, unleſs twelve of them conſent thereunto, which I could not forbear the more expreſly to repeat; *It being fit and neceſſary for all Gentlemen and others who ſerve in Grand Juries to know*, to prevent miſtakes of what is ſo plainly the Law in all Caſes of Preſentment and Indictment by *Grand Juries.*

That *Juries* are Judges not only of Fact, but of Law, by your Treatiſe may more fully be ſeen, and may clearly appear by their Power to give Special Verdicts as well in Capital as Common Matters, as in Caſe of Indictment of Burglary, they may find only the Felony, and acquit of the Burglary, and many ſuch

ſuch like Caſes, as where Indictment for ſtealing Goods therein mentioned, of the Value of Ten Pounds, they may find the ſame to be but Ten Pence, and ſo to be but *Petit Larceny*.

And I hope it will not ſeem tedious to ſhew that *Juries*, as well of *Inquiry*, as *Tryal*, have ſometimes been Judges alſo in Matters of the Church and Religion, even in time of *Popery*.

As in Caſes of *Præmunire*, ſuch anciently was the Care and Watchfulneſs which our Law provided againſt the Danger and Incroaching Juriſdiction of the *Popes* and *Church of Rome*, which have always had Deſigns againſt *England*, *our Laws and theirs being incompatible*.

Therefore from the time of King *Edward* the Third, and the Reigns of the ſucceeding Kings, there have been Laws made, That *if any of*

the Kings Subjects obtain Proviſion or Promotion to Beneſices, or if any Appeal from the Kings Courts of Juſtice to the Court of Rome, *&c. they ſhall be Impriſoned during Life, and Forfeit their Lands and Goods, and be out of the Kings Protection.* And we know that the way of Inquiry and Tryal in theſe Caſes hath always been by *Juries*.

There are ſome other Matters Compriſed within the Conſtruction of the Statute of *Præmunire*, as the drawing Matters any where elſe to another Examination than in the Kings Courts of Law. And many other Offences made to be under the like Puniſhment, and call'd *Præmunire* by other Statutes, which we need not here mention; my intention being only hereby to ſhew that *Juries* have been anciently Judges of *Eccleſiaſtical Matters* even in time of *Popery*.

And

And for their having been Judges of Religion alſo, we may ſee, after King *Henry* the Eighth had Caſt off the *Pope's* uſurped Supremacy, and by the Power of a Parliament reſtored the Crown and Laws of *England* in Church Matters, to their ancient Rights and Uſage, but had not then Caſt off the *Popiſh Religion*; He, with the Lords Spiritual and Temporal, and the Commons in Parliament, in the Thirty firſt Year of his Reign, even at the Inſtigation of the Clergy (as is Recited in the Record of that Statute, and in *Raſtal's* Printed Book of Statutes at Large, 31 *H.* 8. *c.* 14.) Enacted that the Statute (commonly call'd) of Six Articles; whereby,

1. The Real Preſence in the Sacrament was to be believed.

2. That the Communion in both kinds was not neceſſary.

3. That Prieſts ought not to Marry.

4. That Vows of Single Life are to be kept.

5. That Private Maſſes were agreeable to God's Word.

6. That Auricular Confeſſion was neceſſary, and that if any one ſhould Publiſh, Declare, Say, Affirm, Argue or Hold any Opinion againſt the ſaid Articles, he ſhould ſuffer Pains of Death, without benefit of Clergy, and Forfeit all his Eſtate, Real and Perſonal, and Commiſſions were to be directed to the Biſhops of the Dioceſs, their Chancellors, Commiſſaries, and other Perſons, as the King ſhould appoint, to *Inquire by the Oaths of Twelve Men concerning theſe Matters.*

Of which Statute, the Learned Dr. *Burnet*, in his *Hiſtory of Reformation*,

formation, Folio 266. hath obſerved, "That there was but one "Comfort which the poor Reformers could pick out of the whole "Act, *that they were not left to the* "*Mercy of the Clergy in their Eccleſiaſtical Courts, but were to* "*be Tryed by a Jury, where they* "*might expect more Candid and* "*Gentle Dealing.*

But though theſe Matters were thereby to be brought before a *Jury*, yet ſo great were the Arts and Induſtry of the Biſhops and thoſe who were then moſt Zealous to uphold *Popery*, that they indeavour'd ſometimes to bring back theſe things to their way of Determining without, and to lay aſide *Juries*, and often when theſe Matters were brought before *Juries*, they did overawe them, and overſtrained this Law, and ſo dreadful were the Storms, and ſo grievous

the Perſecutions againſt the then Diſſenters, that in the 35*th.* Year of the ſame Kings Reign, to qualifie the Severity (as by the Record thereof, and *Raſtal's* Book of Printed Statutes at Large, 35 *H.* 8. *cap.* 5. may be ſeen) that whereas by force of the former Statute of 31 *H.* 8. *Certain falſe Accuſations and Preſentments were brought againſt the Kings Subjects, and ſuch Accuſations and Preſentments were kept ſecret from the knowledge of the Accuſed, till time eſpied, and they by Malice Convict, to the great Peril and Danger of the Subject.* It was therefore Enacted, that Preſentments and Indictments on the ſaid Statute whereunto any perſon ſhall be call'd to anſwer, *ſhall be in open Court, upon the Oaths of Twelve indifferent perſons according to Equity and good Conſcience, and as other Preſentments have been uſed*

to

to be taken in this Realm in ſuch weighty Cauſes, according to the good and laudable Cuſtom and Uſage of the ſame. And that the Inquiry and Tryals upon the ſaid Preſentments and Indictments may Juſtly and Charitably proceed without Corruption or Malice accordingly.

If any Object againſt this laſt recited Act, That the Statute of 31 *H.* 8. of the Six Articles, was afterwards, in the time of King *Edward* the Sixth, Repealed, and that this latter Statute of 35 *H.* 8. is alſo Repealed, or of none Effect; It is to be anſwered, That though the firſt be Repealed, and that the latter Statute, in what it relates to the former Statute in that reſpect be Repealed, or of no Uſe, yet as to what *it doth Declare and Affirm to be the Ancient and long uſed Courſe of Law, that Juries ſhould proceed*

proceed according to the Laudable Cuſtom and Uſage of this Realm and agreeable to good Conſcience and Equity, and Charity, without Malice or Corruption, and that the Lives of the Subjects ought not to be drawn into danger by Falſe and Malicious Accuſations, and Secret or, Corrupt Practices.

Theſe are ſuch *Fundamental Maxims* and Rules of Law as cannot be Repealed, and no Judges whatſoever may give any Expoſitions to the contrary, any more than they can do againſt *Magna Charta*, or any other Fundamental Maxims or Rules of our Laws and Government.

Thus you may ſee what was then declared by the *greateſt Authority on Earth, the King, Lords and Commons in Parliament*, that the Laudable Cuſtom and Uſage of this Realm, hath ever been for

Grand

Grand Juries to make their Preſentments and Indictments according to good Conſcience and Equity, and *that they ought to proceed therein as well Charitably as Juſtly.*

Since therefore in ſuch matters as belong to Grand Juries to enquire, or are brought before them, they have as large Power as a Lord Chancellour hath in matters within his Cogniſance Well might Antiquity call them Grand Juries, as *Magna Charta* is called the Great Charter, from its great and weighty Contents.

Here I would not have it thought a Digreſſion to add, that having ſeemed before to ſpeak only of Grand Juries, and Juries of Tryal in Criminal Cauſes, that the like Rules are to be obſerved concerning Juries in Tryal of Actions between Party and Party, that the Judge ſhould always leave the matter

ter impartially and fairly before them, which would much diminiſh the number of trivial Actions, as of ſlander for words, &c. whereof there may be ſome doubt, whether ſome of them would bear an Action, if the Judge would be pleaſed at the Tryal not to countenance either Party, where a great Man ſometimes will bring Action againſt a mean or poor Man for words it may be but ſlightly proved, though by Witneſſes of ſeeming gravity, & not give directions thereupon, to give exceſſive Damages by reaſon of the great Quality of the Plaintiff.

I ſhall further take leave to obſerve, that *both Juries of Inquiry, and Juries of Tryal, with their Power and Priviledges*, are ſo naturally the Rights of *Engliſh-men*, that even when ſtrong Endeavours were uſed to lay them aſide by an Act of Parliament, which *Empſon*

and

and *Dudley* (whom, though you mentioned in your Book, and I must take occasion to repeat with some Observation thereon) had procured in 11 *H.* 7. to proceed without Juries; yet when, like wicked Gardiners (for Gardiners may be a Simile for Councellors and Ministers of Justice and Government, and be styled good or bad as they behave themselves) the aforesaid *Empson* and *Dudley*, instead of using the Power they possest in their Masters favour, which should have been for preserving, had cut down some of those Ancient Trees of wholsome Fruit [the way of Enquiry and Tryal by Juries] and digged deep to bury them by the Act of Parliament they had obtained to that purpose, and hoped they would never rise again: Yet, *there being a lasting Life in our good old Laws*, (though sometimes as little to be discerned,

as

as when the Life of Trees in Winter-time retires inviſibly to their Roots:) The Act of 11 *H.* 7. was Repealed by an Act of Parliament, 1 *H.* 8. and the Uſe of Juries reſtored *and ſprang up again*, to the Confuſion and Deſtruction of thoſe Treacherous Gardiners, of whom the Hiſtory is Famous enough, to be a warning to all others to avoid the like miſchief.

And how careful Judges have ſince been, and ought to be to maintain the Ancient and Rightful courſe of Law, and not to go out of it, may be ſeen in *Anderſon*'s Reports, *fol.* 156. where *Empſon*'s Indictment is recited at large. That Act of Parliament by which he and *Dudley*, being as in the 94 *Pſalm*, ver. 20. like the ſeeking *to eſtabliſh miſchief by a Law*, and ſo contrary to the good Fundamental Law of *England* to Enquire and Try by Juries; *that*

though

though it was an Act of Parliament they Acted by, it proved too weak to ſave their Heads; and became Fatal to them who procured, and were chief Inſtruments in the Execution of it; and the inferiour Inſtruments, the Informers and Promoters, were alſo ſeverely Puniſhed, and dyed ſhortly after, as mentioned by the Hiſtory of King *Henry* the Eighth, Written by the Lord *Herbert*.

As an Appendix to the Treatiſe of Juries, might be alſo recommended to your Conſideration, the late increaſe of *Informations in the Crown-Office of Court of the Kings Bench in Criminal Caſes, not ſpecially and particularly expreſt on directed by any Statute*; for thereby the Subject is drawn into *hazard of Liberty and Eſtate* without Preſentment or Indictment of Grand Jury, and thereby deprived of that *great and good*

Good out-guard of his Liberty and Property, the Inqueſt by Oath of twelve Men, before he ſhould be brought to Tryal, which is worth the Judges Care to rectifie, or will be worthy the Conſideration of a Parliament by a Law more fully to remedy for the future.

By having, after named *Empſon* and *Dudley*'s Hiſtory, mentioned the Miſchiefs, which if not carefully prevented, would grow by the Increaſe of the laſt mentioned Informations in the Kings Bench, I do not in either of theſe Caſes intend any Reflection on any of the Judges; for as I am a Son of a Judge, who whilſt he lived made it his Care to maintain, as well as uſe the Rules and due courſe of Law, and often, as well in publick as private Diſcourſe, would praiſe the Excellency of our Laws, and particularly thoſe of Enquiry and Tryal by

by *Juries*; I bear ſuch Honourable Reſpects and Kindneſs to the preſent Judges, as to believe and hope, that whatſoever (may ſometimes happen) they always do, and will for the future, make it their Care to Preſerve the Law in its due Courſe, and to Prevent any Miſchief or Inconvenience from Entring or Growing in the Uſe or Practice of it.

I would here cloſe, but that I could not totally forbear to take ſome Notice of the Ways which are uſed to Puniſh thoſe *Proteſtants who do not Conform in the Outward Manner of Worſhip and Ceremonies, though they Agree with our* Engliſh Church *in the Main Doctrines thereof*, and in all reſpects behave themſelves *Peaceably*, whereof I crave leave freely to ſay my mind.

That,

That, though I Love our Church, and frequently and duely receive the Sacrament, and I and all my Family come conſtantly to Church every Sunday, (except hindred by Sickneſs, or other Extraordinary Impediment) and continue decently there during all the time of Divine Service; and I ſo well love the *Common Prayers* thereof, that I uſe part of them in my Family; and would perſuade all I can to the like Conformity; yet I have that kindneſs to all thoſe Proteſtants, commonly call'd *Diſſenters*, who by reaſon of *Tenderneſs of Conſcience, different Education, or Uſe of other manner of Worſhip, and who, though they differ in Opinion, concerning ſome leſſer Matters, yet hold the main Doctrin of Chriſtianity, wherein all Proteſtants agree*, notwithſtanding their different manner of Worſhip.

And

And I could uſe many Arguments for *Gentleneſs* towards them; whereof I ſhall here only name the *Topicks* of ſome of them; which are,

From the Common Senſe of Humanity.

From Principles of Right Reaſon.

From Chriſtian Charity.

From Divine Command, and the Holy Scriptures.

From its being well pleaſing to God, and the Way to have his Bleſſing.

That the Beginning of Perſecution of, and among Chriſtians was from Antichriſtian Principles.

That Perſecution is chiefly uſed by the Pope *and* Church of Rome.

That Union of Proteſtants is the Common Intereſt of the Proteſtant Religion both here and abroad.

That Union of Proteſtants is the beſt Way to Preſerve and Defend

us

us from the Idolatry, Policy and Force of Popery.

That the ſafety of Chriſtendom depends upon it.

That it is the beſt way to preſerve the Engliſh *Monarchy*, ſo as thereby it would Ballance, and Hinder the *French King* from gaining *the Univerſal Monarchy*, and be a Means to Preſerve the Countries and Dominions of *all other Princes of Europe in* Safety.

That it would much increaſe the Peopling of this Land by quiet dwelling here.

That it would infinitely inrich this Nation by Increaſe of Trade, and Value of Land.

That Trade being thereby increas'd, His Majeſties Cuſtoms will be alſo very much increas'd.

That Gentleneſs, Mercy and Kindneſs are honourable Qualities.

That

That these Qualities are agreeable unto the Gracious Expressions of his Majesty to his Protestant Subjects concerning the same.

That it is sutable to the Kindness he shews to the Persecuted French Protestants.

That we hope some of his Counsellors and our Best Magistrates, are of the like Honourable Mind, concerning Gentleness to be used to *Protestant Dissenters,* and that the Measure of their Goodness will be esteem'd and taken by the Degrees of their Disposition to such Gentleness.

I could name more Particulars from whence much might be said on every of them to this purpose; which Task though it would be rather Pleasant than Difficult, I shall not meddle with, but leave it to some other

other, who will better perform it than I can, it being unneceſſary here to ſay more thereof, becauſe it is here only proper to Obſerve how ſome late Acts of Parliament, relating to Church Matters, leaving the Truſt of Puniſhing thereby, to the diſcretion of the Magiſtrates, without the uſe of *Juries* (which is ſo great a Truſt, as was not uſually left to any Judges in former Ages;) thoſe who have that Power ought to be the more careful, diſcreetly and prudently to uſe it with Moderation, *and not to abuſe ſo great a Truſt by overſtraining ſuch Laws, hunting after, and taking all Occaſions they can to Puniſh their fellow Subjects with the utmoſt, or beyond the rigor, and contrary to the intention of thoſe Laws.*

And whereas one of the late Acts, allows *an Appeal*, it may yet ſeem

ſeem hard for *an Engliſhman* to be put to that *after-game* of a hopeleſs Tryal of his Appeal by a *Jury*, when he is deprived of his *firſt Legal Gard, a Grand Jury*, to whom by the *Laudable and Ancient Uſage of* England, *all Preſentments and Indictments in Criminal Matters do belong.* And it is further to be conſidered, that the Perſon who is brought into this Trouble, may be under great Difficulties, whether to deſire, or how to manage his Appeal, when, perhaps, *all his Goods*, by ſelling whereof he might provide Money to Depoſit, as the Law requires, before he can be admitted to Appeal, *are taken from him by Diſtreſs, and at laſt his Appeal ſhall be Tryed before the ſame Juſtices* that Inflicted the Penalty on him, and alſo that the Proſecution at the Tryal

ſhall be managed by the Informers, who are to be ſharers of the Profit they can get by the Poor Mans Ruine.

Theſe are ſome of the Conſiderations I could not omit to mention, together with my wiſh, that the good Reputation of our Ancient Laws may not be clouded by any more ſuch new Laws, as herein ſeem to imitate Eccleſiaſtical Courts, where proceedings are without Juries, which it ſeems ſome of our Clergy in times paſt did think to bring to paſs, whereof, though I could mention ſome Inſtances, I ſhall only cite one fully to our purpoſe, out of the Lord *Cokes 2d.* Part of *Inſtitutes*, being his Expoſition on ſome Statutes, *fol.* 599. &c. where he ſaith, *It will conduce much to the underſtanding of this matter, to report unto you what Articles Arch-Biſhop* Bancroft *exhibited in the Name*

Name of the Clergy, in Michaelmas *Term,* 3 Jacobi, *to the Lords of the Council, againſt the Judges of the Realm, Entituled, Certain Articles of Abuſes, which are deſired to be Reformed in granting Prohibitions. And the Anſwers thereunto, upon mature Deliberation and Conſideration, in* Eaſter *Term following by all the Judges and Barons of the Exchequer, with one unanimous conſent under their Hands. Reſolutions which were by them delivered to the Lords of the Council, and for diſtinction ſake, becauſe there might be occaſion often to cite them, called Articuli Cleri,* 3 Jacobi.

Theſe Articles, and their Anſwers being very long, I muſt refer to be there read, as being very material to be known, how the Clergy endeavoured to get the multitude of Buſineſſes into their Courts

to be determined without Juries, and ſo encroach upon, and alter the Courſe therein of our good *Engliſh* Laws and Government. At the end of thoſe Articles and Anſwers, the ſame Author further ſaith,

That the Clergy claimed to Interpret all Statute-Laws concerning the Clergy; but it was Reſolved by all the Judges of England, *That the Interpretation of Statutes concerning the Clergy, being parcel of the Laws of the Realm, belong to the Judges of the Common Law.* And ſaith, *Magna eſt veritas & prævalet.* To which, as agreeing to the truth thereof, I may add, *Lex* Angliæ *optima eſt, & prævalebit.*

I would not have any of our preſent Clergy think I Reflect on them, for I truly and heartily Honour ſome of our Biſhops and Dignified Clergy, and any others of them, whoſe ſoundneſs of Doctrine, great Learn-

Learning, and good and Sober Lives are, and might be Examples for all the reſt, and for whoſe ſake I bear Civil Reſpect to the reſt that are not altogether ſo praiſe-worthy as thoſe good and moſt Reverend Men, to whom I bear my chief Reſpects, but ſhall ſay no more of any of them here, but that I hope they will leave off ſevere Puniſhing their fellow-Chriſtians, *and forbear one another*, Col. 3. 13. *And ſtudy to be quiet, and meddle with their own buſineſs*, 1 *Theſ.* 4. 11. And that by a re-view of theſe Laws, theſe things will in due time receive prudent and gentle as well as ſufficient Cure and Remedy in Parliament.

And now, Sir, I hope you will Pardon me, for having, perhaps, been too tedious, ſeeing your Excellent Treatiſe contains ſo much on the behalf of Juries, that all that I can ſay, may ſeem needleſs; and

you may think fit to lay aſide what I have written; yet if it only have the effect to diſpoſe you to let us know to whom we owe our Acknowledgments for your ſo good Book, which is fit for every *Engliſh-man*, who may think himſelf concerned in our Rights, to read and underſtand, I ſhall think it enough to teſtifie that amongſt thoſe you will infinitely Oblige thereby; I ſhall deſire to be

Your Friend and

Dec. 29. 1681. *Servant*, J. M.

I Shall here add a neceſſary Poſt-ſcript concerning 3 *H.* 7. *Cap.* 1. wherein there is a Clauſe, how in ſome ſpecial Caſe, a Jury of Enquiry may be fined, *That it only concerns ſuch Matters and Offences whereof Indictments may be brought before Juſtices of the Peace in their County Seſſions; if the Matter be plain and fully proved, and they wilfully conceal the ſame*, the ſaid Juſtices of the Peace might cauſe

a new

a new Inqueſt to be returned (but the words, *take Inqueſt*, do not give the Juſtices power to name who ſhall be returned, *which is the Sheriffs office*) and it is to be only and purpoſely to enquire of ſuch Concealment; and doth not extend to enquire of any other Offences whatſoever; and then after ſuch wilful Concealment is found by ſuch Inqueſt, *The ſame Juſtices of the Peace, in their County-Seſſions, might Fine the Jury of the former Inqueſt.* By which may be Obſerved, That *the ſaid Clauſe of the ſaid Act of* 3 H. 7. *doth fully and clearly prove, That by the Common-Law, Juries were not Finable concerning their Preſentments, Indictments, and Verdicts.* And even that Clauſe, ſince that time, being One hundred Ninety and four Years, or thereabouts, hath ſeldom or never been uſed. Our Books of Reports of Law-Caſes not affording any plain or full Inſtance of any proceeding on that Clauſe of that Statute. Therefore it may ſeem, as *Littleton* ſaith in his Book, *Section* 108. *That in as much as it was never ſeen or heard that any Action was brought on the Statute of* Merton (*which was made* 20 H. 3.) *For the matter he treats of in that*

Section, no Action could be brought thereon. For if any Action might have been brought for that matter, it ſhall be intended, that it would ſome time or other have been put in ure. And with this agrees the Lord *Coke*, in his Comment on that place. And alſo the Judges, in their Arguments on a late Caſe of Action brought on the Statute about the Return of Members of Parliament, did Cite the ſaid place of *Littleton*. By which appears concerning ſuch unuſual manner of Fining Juries by the Clauſe of 3 *H.* 7. how there ought to be great Caution in Executing any Acts or Statutes where they alter the Common-Law and Courſe thereof; ſeeing that Act of 3 *H.* 7. in that particular, and other memorable things therein, made then ſuch alterations of the Common-Law of this Realm, as I forbear any further here to mention.

FINIS.

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